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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

JOHNATHAN ANDREW DOODY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Johnathan Doody killed eight Buddhist monks and a nun at a Buddhist temple near Phoenix Arizona in 1991. During questioning by law enforcement officers, he admitted being at the Temple when the victims were shot.

The state trial court conducted a 12-day hearing on Doody's motion to suppress his statements. The court heard the officers testify, listened to the audio tapes of the interview, and found that Doody was advised of and waived his *Miranda* rights and that his subsequent statements were voluntary. The Arizona Court of Appeals carefully reviewed the record and upheld the *Miranda* and voluntariness findings. After a federal district court denied Doody's federal habeas petition, the Ninth Circuit Court of Appeals reversed. Over a vigorous dissent, a majority of an *en banc* panel of the Ninth Circuit held that the Arizona Court of Appeals' *Miranda* and voluntariness analysis amounted to "unreasonable" determinations of federal law and facts.

1. Did the Ninth Circuit disregard the AEDPA and this Court's recent decision in *Florida v. Powell* when it held that the *Miranda* warnings given to Doody were inadequate?

2. Did the Ninth Circuit disregard the AEDPA when – based on its mischaracterization of the state court record, redetermination of witness credibility, and drawing of inferences adverse to the states courts' legal and factual determinations—it held that Doody's statements were involuntary?

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OPINIONS BELOW

The Ninth Circuit Court of Appeals' *en banc* opinion is reported as *Doody v. Schriro*, 596 F.3d 620 (9th Cir. 2010). (Petitioner's Appendix ("Pet. App.") A.) That opinion reversed a decision by the United States District Court for the District of Arizona, adopting the Magistrate's Amended Report and Recommendation and Order (Pet. App. B) denying Doody's petition for writ of habeas corpus. The Arizona Court of Appeals opinion is reported as *State v. Doody*, 930 P.2d 440 (Ariz. App. 1996). (Pet. App. C.)

STATEMENT OF JURISDICTION

The Arizona Court of Appeals affirmed Doody's convictions and sentences on direct appeal. *State v. Doody*, 930 P.2d 440 (Ariz. App. 1996). (Pet. App. C.) The Ninth Circuit Court of Appeals had jurisdiction to review the federal district court order and judgment denying the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2253. An *en banc* panel of the Ninth Circuit reversed the federal district court's judgment denying the petition. *Doody v. Schriro*, 596 F.3d 620 (9th Cir. 2010). (Pet. App. A.) This petition for writ of certiorari is timely filed within 90 days of that decision, and this Court has jurisdiction pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATUTES

28 U.S.C. § 2254 provides, in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> . . .
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

. . .

STATEMENT OF THE CASE

A. Material Facts.

In 1991, Jonathan Doody (Doody) was living at Luke Air Force Base west of Phoenix, Arizona with his parents. His brother, David, was a novice monk at a nearby Buddhist Temple, and his mother cooked meals for the monks. Doody attended Agua Fria High School, where he was the commander of the R.O.T.C. Honor Guard and Color Guard, and also was active in the Civil Air Patrol.

In early June, Doody suggested to his friend, Alex, Garcia, that they rob the Temple. During their visits with David at the Temple, they questioned him regarding details of the Temple. Doody wanted to wait until David left the Temple to commit the robbery, so David would not recognize him. Initially, the plan was "just robbery" but, in late July, Doody decided to "just basically go ahead and shoot them," "execution style" so there would be "[n]o witnesses."

Doody and Garcia agreed to commit the robbery on the night of August 9, 1991. On August 7, they borrowed a .22 caliber rifle from Rolando Caratachea. They decided that Garcia would take his father's 20-gauge shotgun and that Doody would have the .22 rifle.

A week prior to August 9, Doody was with Brandon Burner, a fellow student and member of the R.O.T.C. Color Guard. Doody told Burner that he could not be with him on Friday, August 9, because he and Garcia were going on an "intrusion alert" near the Buddhist Temple.

On the evening of August 9, Doody and Garcia met at Amanda Hoelzen's house. They left her house about 9:00 p.m. and drove to a citrus grove and changed into camouflage clothing. They entered the Temple, told the occupants that they were the police, and moved them to a room. While Garcia stood guard over the monks, Doody went through the rooms looking for valuables. Doody then stood guard over the monks while Garcia went through the rooms looking for any valuables that Doody had missed. After a while, a nun who apparently had been asleep, came out, and they made her stay in the room with the eight men. After they had put all of their loot in the car, they shot the victims; Doody fired 17 .22 caliber bullets into the heads of the victims, and Garcia fired four shots from the shotgun. They took six cameras, a CD player, two portable stereo sets, some jewelry, several wallets, a knife, a police scanner, and $2,650 in cash.

The bodies were discovered on the morning of August 10. At 4:30 that afternoon, Doody saw his friend Angel Rowlett, and told him about the killings, saying that the monks had been killed with rifles. At 7:00 that evening, Doody was driving in his car with Brandon Burner, and "out of the blue" began talking about the Temple killings. Doody said the Buddhists were murdered for nothing, that there were a bunch of gunshots that went off, and that they were shot in the chest and head.

It was determined that the murder weapon was a .22 caliber rifle manufactured by the Marlin Company. On August 21, while with Doody on Luke Air Force Base, Rolando Caratachea consented to a search of his

car, and a military police officer found a Marlin .22 caliber rifle in the car. The rifle remained in Caratachea's possession. The Air Force police subsequently told officers investigating the Temple murders of the August 21 incident, and gave them Caratachea's name.

Shortly after the murders, Doody's father was transferred to an Air Force base in Colorado and Doody's parents moved. Doody wanted to stay in Arizona to complete his schooling, so he moved in with a friend, Moises Cruz, for a week or two, then rented an apartment with Rolando Caratachea and Mike Myers for a couple of months, and then moved in with Garcia.

On September 1, Angel Rowlett saw Doody and, because Doody's mother and brother were members of the Temple, Rowlett asked Doody if he heard anything more concerning the murders. Doody said the investigators thought it might be gang-related, and while describing what the killers had done, Doody first talked about what "they" did, but as the conversation went on, he talked about what "we" did. He said the "primary mission" was to rob the place and that "they" were supposed to go in and leave, but one of the monks had awakened. After "they" became "we," Doody identified the "we" as himself and Alex Garcia. He said they dressed in military clothing and took rifles with them. Doody said that, once the monks awoke, he and Garcia started shooting because he did not want anyone to identify them.

Vicki Jones had been Doody's girlfriend since May 1991. In September, Doody told Vicki that he used to

kill people for money, and the "OSI" (Office of Special Investigation) had killed the people in the Temple. Doody said that he and Garcia had obtained $2,000 by killing people, and that he had killed them "execution style," which he described as having them on their knees with their hands behind their backs and shooting them in the head.

Ben Leininger was a student at Agua Fria High School, who met Doody in R.O.T.C. During a Color Guard practice after the killings, Doody told Leininger that he worked for the OSI. He said that the people in the Temple were not Buddhist monks, but were threatening national security, that they had to be eliminated, and that he and Garcia had eliminated them. He said that he and Garcia met first in the river bed, and that they shot the victims "mercenary style," which meant shooting them in the back of the head.

On September 10, Detective Sinsabaugh went to where Rolando Caratachea was working, told him he was investigating a burglary, and that he thought a rifle Caratachea had might have been taken in a burglary. Sinsabaugh asked Caratachea if he would mind giving it to him so he could check it and Caratachea agreed. They went to the apartment Caratachea shared with Myers and Doody, and Caratachea gave Sinsabaugh the rifle.

Sinsabaugh interviewed Doody because his brother had lived in the Temple. Doody was not a suspect. Doody talked about his brother being a novice monk at the Temple and of visiting him there, some times with Alex Garcia and Angel Rowlett.

Also, on September 10, the investigating officers learned from the Tucson Police Department that a person who claimed his name was "John" said he had information regarding the Temple murders. Officers later learned that "John" was Mike McGraw, and he was a patient at the Tucson Psychiatric Hospital. McGraw said that he and three others were involved, Leo Bruce, Mark Nunez, and Dante Parker (the "Tucson Four"). The officers arrested the four Tucson suspects on September 13 and 14, and the State later charged them with the Temple murders.

Although the officers believed they had the killers, they still had not identified the murder weapon. By September 10, they had collected 96 Marlin rifles, all of which had to be tested. Caratachea's rifle was not submitted for testing until a month later.

On October 22, the task force officers learned that Caratachea's rifle was the murder weapon. Officers contacted Caratachea, and he agreed to come to the police station. Caratachea said he had loaned his .22 rifle to Garcia and Doody on August 8 or 9, 1991.

At about 8:00 p.m., Detective Patrick Riley and F.B.I. Special Agent Gary Woodling drove to the Agua Fria High School football game, where Doody was present in his role as commander of the R.O.T.C. Color Guard. When they arrived, they learned that Doody was in the parking lot, so they drove up to him, and while seated in the car, identified themselves.

Detective Riley asked Doody if he remembered his previous interview with Detective Sinsabaugh; Doody said he did. Riley explained that they had some

additional questions about the rifle they had taken from Caratachea and asked Doody if he was willing to go to the police station; Doody said he was willing, opened the door of the police car himself, and got into the back seat. As the officers were leaving, they received word that Garcia might be in the area, so Special Agent Woodling got out of the car to look for Garcia, and Doody got into the front seat. Detective Riley and Doody arrived at headquarters at 9:10 p.m.

An interview began with Detectives Riley and Manley present. The interview, which lasted about 13 hours, was tape-recorded, without any breaks in the recording. Although Doody was not under arrest and was not a suspect, Riley read Doody his rights, employing the standard-issue juvenile *Miranda*[1] form. (Pet. App E.) Before proceeding through the warnings, Riley followed standard procedure by obtaining from Doody his age, date of birth, grade in school, and overall performance in school. (Pet. App. F at 5–9.) Doody said that he was in the 11th grade and had an overall "B" average. (*Id.* at 8.) Doody appeared to understand the warnings, and did not show any doubt or confusion. (*Id.* at 9–13.) Riley added some explanations to help Doody understand his rights. (*Id.*) Doody initialed the boxes on the juvenile *Miranda* form. (*Id.*; Pet App. E.)

When asked about Caratachea's rifle, Doody initially denied that he ever borrowed or possessed it. However, about 2½ hours into the interview, he admitted that he and Garcia had borrowed it. As the

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

detectives' questions became more pointed, Doody began looking down, playing with his R.O.T.C. beret and a pop can, ceased eye contact, and became quiet. Doody said he was afraid because there had been threats toward his girlfriend and his family.

The only other officers in the room during parts of the interview were Captain White and Detective Sinsabaugh. When Sinsabaugh entered the room at about 2:45 a.m., he became the primary questioner. At that point, Detective Sinsabaugh noted that Doody was "very erect, had a military bearing, and he appeared alert." Doody indicated that he was afraid for his own safety, and that of his girlfriend and family. Sinsabaugh asked, "Were you involved?" Doody replied, "Yes."

Doody said that he and Garcia drove and parked near the Temple, and that Rolando Caratachea, George Gonzalez, and at least one other person arrived in another car. Doody claimed that the only plan was to probe the Temple security system, but things "just went downhill" and they entered the Temple. Doody said that eight monks and a nun were taken from their rooms and put in the living room and they "ransack[ed]" the rooms. Doody claimed that one of the captives yelled out Gonzalez' name and Doody was told to go outside to determine if the Temple was "soundproof." Doody said that, after he went outside, he heard a shot fired, he walked into the Temple, then there were three shotgun blasts and several shots fired from the .22 rifle into the heads of the monks and nun. Doody denied shooting any of the victims. He claimed that they grabbed some items from the Temple,

including cameras, a radio, and cash found under a bed, and fled.

Doody claimed that Gonzalez and some of the others threatened to kill him, his girlfriend, and members of his family if he told anybody what happened. Doody said, "I didn't know it was supposed to happen," and, "I've never meant to get involved."

B. Procedural Background.

Doody and Garcia were charged with nine counts of first-degree murder, nine counts of armed robbery, one count of burglary, and one count of conspiracy to commit armed robbery. Both Doody and Garcia moved to suppress their statements to law enforcement officers and the trial court held a 12-day evidentiary hearing on the motions. The trial court also listened to the entirety of Doody's and Garcia's taped interviews. The court denied both motions to suppress. Regarding Doody's motion to suppress, the trial court found that Doody was advised of and waived his *Miranda* rights, and that his subsequent statements were voluntary. (Pet. App. D.) Garcia then entered into a plea agreement with the State and testified at Doody's trial. Following a 2-month jury trial, Doody was convicted on all counts.

On direct appeal, the Arizona Court of Appeals addressed Doody's *Miranda* and voluntariness claims at length, finding that his statements were *Miranda* compliant and voluntary. *State v. Doody*, 930 P.2d 440, 445–49 (Ariz. App. 1996) (Pet. App. C.) On federal habeas review, the district court magistrate carefully, and in detail, reviewed the *Miranda* and voluntariness

claims, concluding that the Arizona Court of Appeals' rejection of the claims was neither contrary to, nor an unreasonable application of, clearly established federal law. (Pet. App. B.) The district court adopted the magistrate's findings.

On appeal, a three-judge panel of the Ninth Circuit Court of Appeals found that the Arizona Court of Appeals' determination that Doody was advised of and waived his *Miranda* rights did *not* constitute an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1). *Doody v. Schriro*, 548 F.3d 847, 862–66 (9th Cir. 2008). However, the panel concluded the Arizona Court of Appeals' determination that Doody's subsequent statements were "voluntary" under the Fourteenth Amendment *was* an "objectively unreasonable" application of clearly established federal law. *Id.* at 866–69.

Petitioners' motion for rehearing *en banc* was granted. 566 F.3d 839 (9th Cir. 2009). On February 25, 2010, a sharply divided 11-judge *en banc* panel issued its opinions. (Pet. App. A.) The seven-judge majority held that the Arizona Court of Appeals' determination that Doody was adequately advised of and waived his *Miranda* rights constituted "both an unreasonable determination of the facts and an unreasonable application of clearly established federal law." (*Id.* at 78.) The majority also held that the Arizona Court of Appeals' finding that Doody's statements were voluntary was an unreasonable determination of the facts and an unreasonable application of clearly established federal law. (*Id.* at 78–79.) Accordingly, the majority ordered that the

district court grant Doody a writ of habeas corpus, unless the State of Arizona retried him within a reasonable time. (*Id.* at 79.)

Chief Judge Kozinski concurred in the result, disagreeing with the majority's conclusion that the Arizona Court of Appeals' finding that Doody's statements were voluntary amounted to an unreasonable determination of facts or an unreasonable application of clearly established federal law. (*Id.* at 79–82.) However, Chief Judge Kozinski held that the Arizona Court of Appeals' finding that Doody was "adequately warned" of his *Miranda* rights constituted an unreasonable determination of clearly established federal law. (*Id.* at 82–91.)

Judge Tallman, joined by Judges Rymer and Kleinfeld, wrote a spirited dissent, chastising the majority for failing to heed this Court's repeated admonition that Ninth Circuit judges comply with the dictates of 28 U.S.C. § 2254(d) and grant appropriate deference to state court determinations of fact and law and not substitute their judgments for that of the state courts. (*Id.* at 91–93.) The dissent pointed out that "the majority reviews the record as though it were the initial finder of fact or reviewing a federal conviction on direct appeal" and "pays mere lip service to AEDPA and then proceeds as if it does not exist." (*Id.* at 101.) After reviewing the state court record and this Court's clearly established federal law, the dissent concluded that the Arizona Court of Appeals' finding that Doody was adequately advised of and waived his *Miranda* rights "was not objectively unreasonable." (*Id.* at 112.) The dissent then reviewed the facts bearing on the

voluntariness of Doody's statements and concluded that the Arizona Court of Appeals' "holding on the facts presented fell squarely within the bounds of Supreme Court precedent on voluntariness." (*Id.* at 130.)

REASONS FOR GRANTING THE WRIT

THE *EN BANC* COURT'S FAILURE TO DEFER TO THE ARIZONA COURT OF APPEALS' DETERMINATIONS THAT DOODY WAS ADEQUATELY ADVISED OF AND WAIVED HIS *MIRANDA* RIGHTS AND THAT HIS SUBSEQUENT STATEMENTS WERE VOLUNTARY CONFLICTS WITH ESTABLISHED PRECEDENT OF THIS COURT.

Once again, the Ninth Circuit has failed to comply with this Court's jurisprudence, the express provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and basic principles of federalism and comity by reversing the district court's determination that the Arizona Court of Appeals' determination that Doody's statements were *Miranda*-compliant and voluntary did not amount to an unreasonable determination of facts or an unreasonable application of clearly established federal law. The *en banc* majority did so by parsing the record, disregarding portions of the record that support the state court's findings and legal conclusions, drawing its own Doody-friendly inferences, and making credibility assessments in contravention of the AEDPA. As noted by the dissent:

> In violation of AEDPA, the majority adjusts the scales and weighs the facts anew. This sort of appellate factfinding on habeas review is contrary to the congressionally mandated standard of review. It also creates unpredictability for habeas petitioners, attorneys, and state and federal courts . . . . Such careless dismissal of reasoned findings is demoralizing and insulting to the state courts, eschewing the principle that "comity between state and federal courts has been recognized as a bulwark of the federal system." *Allen v McCurry*, 449 U.S. 90, 96 (1980).
>
> With little more than a hat tip to the state courts' extensive findings, the majority nonetheless concludes theses findings were "objectively unreasonable." The majority's message to our state courts is clear: no matter how carefully you decide constitutional issues in criminal cases, no matter how well you justify your opinions with evidence of record, we will cast your work aside simply because we disagree. We should instead give the reasonable findings of the Arizona courts the deference to which they are entitled under AEDPA.

(Pet. App. A at 131–32.)

A state prisoner is not entitled to federal habeas relief with respect to any federal claim that was adjudicated on the merits in state court proceedings unless adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under the "unreasonable application" clause of § 2254(d), a federal court is prohibited from issuing a writ "simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 411 (2000)). "A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner." *Brown v. Payton*, 544 U.S. 133, 141 (2005).

"Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, 28 U.S.C. § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see also Wood v. Allen*,

130 S. Ct. 841, 848–49 (2010) (declining to resolve a question this Court had "explicitly left open" in *Rice v. Collins*, 546 U.S. 333, 339 (2006), "whether, in order to satisfy § 2254(d)(2), a petitioner must establish only that the state-court factual determination on which the decision was based was 'unreasonable,' or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence").

As pointed out by the dissent, the Ninth Circuit has repeatedly failed to abide by the provisions of the AEDPA and pay state court factual and legal determinations the deference they are due. (Pet. App. A at 92–93 (citing cases)). It has done so once again.

A. MIRANDA WAIVER.

1. *Applicable Law.*

When a person is both "in custody" and subjected to interrogation, he must be advised of his Fifth Amendment rights to remain silent and to counsel. *Thompson v. Keohane*, 516 U.S. 99, 102 (1995); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). Specifically, a person in custody and subjected to interrogation must be advised "that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479. However, *Miranda* does not require a "talismanic incantation to satisfy its strictures." *California v. Prysock*, 453 U.S. 355, 360 (1981). "The four warnings *Miranda* requires

are invariable, but this Court has not dictated the words in which the essential information must be conveyed." *Florida v. Powell*, 130 S. Ct. 1195, 1204 (2010). "Reviewing courts, therefore, need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (quoting *Prysock*, 435 U.S. at 361); *see also Powell*, 130 S. Ct. at 1204 (quoting *Eagan*, 492 U.S. at 203 and *Prysock*, 453 U.S. at 361).

2. ***Relevant Facts.***

Although when the interview began Doody was not "in custody" or a suspect in the Temple murders, Detective Riley, in an abundance of caution, decided to advise Doody of his juvenile *Miranda* rights. (Pet. App. F at 2–4.) Detective Riley asked Doody if he had heard of a "Miranda Warning" and Doody answered "No." (*Id.* at 3.) Detective Riley then stated:

> They call it Rights on t.v., okay. What, what that is and basically all that is Jonathan is, it's not necessarily something that is, like on t.v. where they portray it when somebody's ah guilty of doing something, ah, we read these things to people on somewhat of a regular basis, whether they're responsible for doing something or not, okay. So *I don't want you to feel that because I'm reading this to you that we necessarily think that you're responsible for anything*, it's for your benefit, it's for your protection and for our's as well, okay?

(*Id.*, emphasis added.) Doody answered "Okay," then Riley asked him some questions to gauge Doody's maturity and ability to comprehend. (*Id.* at 3–8.) Doody related that he was 17, in eleventh grade, and had "[a]bout a B A" average. (*Id.* 6, 8.) He also informed Riley that he had been in the R.O.T.C. at Agua Fria High School for 3 years and added, "I just happen to be in charge of the Honor Guard and Color Guard." (*Id.* at 5–6.) Doody said he was currently living with Alex Garcia. (*Id.* at 7–8.)

Detective Riley then read, and explained to Doody, his *Miranda* rights as follows:

> RILEY: . . . The reason I ask that is just to get an idea of how well ah, you understand things and everything. Okay, and I'm just going to read these verbatim off the, the sheet here and then ah as I said, if, if you have any questions by all means ask me, okay.
>
> DOODY: Okay.
>
> RILEY: And again, it's not meant to scare you so don't, don't take it out of context JONATHAN okay. Ah, what this is, is that ah *you have the Right to Remain Silent* and ah, what it states is that this means that you do not have to talk to me or answer any questions about ah, the matter that we're going to discuss with you, okay. You can be quiet if you, if you wish. Okay, *did you understand that?*
>
> DOODY: *Uh-huh.*

RILEY: Okay, ah, as we go here, they ah, they ask that you initial ah, here indicating that I read it to you and that you understand it. Ah, so if you could ah, as we go, I will go ahead and just have you initial in the box whether you do or you don't.

DOODY: Okay.

RILEY: Okay. And the next one is that *Anything that you say can and will be used against you in a court of law* and what this means is that anything you tell me, I can use later against you in court and a court of law is a place where a judge will decide whether ah, you did something or whether you didn't do something, okay. And a judge is like an umpire in a baseball game. He decides whether you have acted in a right or wrong way, okay. Ah, if you did something wrong ah you may be punished, okay. *Do you understand all of that?*

DOODY: *Uh-huh.*

RILEY: Okay, if you could just initial there. Okay, and the next one states that *you have the right to have an attorney present prior to and during questioning*, and what that means that if you want one, you're allowed to have a lawyer here before and during you know my questions to you, okay. And then an attorney is a lawyer who will speak for you and help you concerning the crime or any kind of offense that ah we might think that you or somebody else is involved in, if you were involved in it, okay.

> Again, it [sic] not necessarily mean that you are involved but if you were, then that's what that would apply to [sic] okay. *And do you understand that?*
>
> DOODY: *Yeah.*
>
> RILEY: *Any questions?*
>
> DOODY: *No.*
>
> RILEY: Okay, Okie doke.
>
> DOODY: Oh yeah what's this for?
>
> RILEY: Ah, okay I'll, again I'm gonna go in and, and explain some things to you. Ah, in the next one states that *if you cannot afford an attorney, you'd have the right to have one appointed for you prior to questioning* okay, and what this means, is if you do not have the money to get a lawyer ah, if you wished ah, one will be given to you free of charge before any questions and things like that, okay. *Do you understand that?*
>
> DOODY: *Uh-huh (indicating yes)*

(*Id.* at 8–11, emphasis added.) Riley then advised Doody of his state right to have a parent present during questioning and the possibility that Doody could be prosecuted in "adult court." (*Id.* at 12.)

Doody initialed each *Miranda* right after it was read by Riley, acknowledging that he understood that particular right. (*Id.* at 9–13; Pet. App. E.)

At no point during the ensuing interview did Doody indicate that he wished to discontinue questioning, remain silent, or obtain the presence of counsel or a parent.

3. *The Arizona Court of Appeals' Determination That Doody Was Adequately Advised Of and Waived His Miranda Rights Was Not Unreasonable.*

In affirming the trial court's finding that Doody was adequately advised of and waived his *Miranda* rights, the Arizona Court of Appeals wrote:

> [C]onsidering the circumstances in their totality, we conclude that the trial court did not err in determining that the officers advised Doody of his *Miranda* rights in a clear and understandable manner and that Doody made a knowing and intelligent waiver. At the outset of the interrogation, the officers advised Doody of his rights under *Miranda* and of his right to have a parent or guardian present during questioning. The officer also advised Doody of the possibility he later could be transferred to adult court. The officers read each warning from a standard juvenile form and provided additional explanations as appropriate. After reading each warning, the officer asked Doody if he understood the right involved and obtained his initials on the form. Although Doody had no prior experience with the criminal justice system, the officers explained the rights in a manner appropriate for his age and apparent intelligence.

> The officers testified at the suppression hearing that Doody appeared to understand the warnings and exhibited no signs of doubt or confusion. Based on that testimony and the court's review of the taped interrogation, the trial court concluded that the officers adequately advised Doody of his rights and obtained an appropriate waiver before continuing. In so holding, the trial court expressly considered Doody's age, intelligence, and lack of prior exposure to the criminal justice system. Our review of the record, including the audiotape of the warnings, supports the trial court's finding that Doody knowingly and intelligently waived his rights, and therefore we will not disturb the court's ruling.

(Pet. App. C at 17–18.) The Arizona Court of Appeals' resolution of the *Miranda* claim is certainly a reasonable application of *Miranda*, *Prysock*, and *Eagan* to the facts of this case.

The *en banc* majority held that the Arizona Court of Appeals' determination was "both an unreasonable determination of the facts and an unreasonable application of clearly established federal law" because, according to the majority: (1) Riley "downplayed the warnings' significance" by telling Doody that the police did not necessarily suspect him of having committed a crime, and, (2) Riley did not read the parenthetical describing the right to have counsel present prior to and during questioning verbatim off the form. (Pet. App. A at 35–42.)

Regarding the majority's first conclusion, Detective Riley did no more than tell Doody the truth: he was *not* a suspect and was being advised of his rights prophylactically, to "protect" both Doody as well as the integrity of any statements he made during questioning. (Pet. App. F at 2–3.) This Court has never held that a law enforcement officer must sternly advise a person of his *Miranda* rights, or that the officer may not tell the person the "truth" regarding the circumstances surrounding the questioning. *See, e.g., Powell*, 130 S. Ct. at 1204; *Eagan*, 492 U.S. at 201–03. Indeed, advising a person in a friendly, non-confrontational manner of his *Miranda* rights and the circumstances under which law enforcement officers seek to question him would clearly provide the person with a more informed basis upon which to decide whether to invoke or waive his *Miranda* rights.

Additionally, the majority infers a nefarious intent on behalf of Detective Riley, finding that "the fact that Detective Riley's explanation of a one-page *Miranda* warning form consumed twelve pages of text is testament to the confusion generated by the detective's obfuscation." (Pet. App. A at 36.) First, the majority is simply wrong. Detective Riley's reading and explanation of the Juvenile *Miranda* form (which included Doody's right to the presence of a parent during questioning as well as the admonition that he could be prosecuted in "adult court") encompassed less than *five* pages. (Pet. App. F at 9–13.) The preceding five pages involved Riley obtaining background information from Doody to gauge his maturity and comprehension. (*Id.* at 4–8.) A total of less than five pages to read a juvenile his *Miranda* and state rights,

the explanatory parentheticals of each, and inquire whether he understands each right is hardly "excessive." Proving the old adage that no good deed goes unpunished, the majority criticizes Detective Riley for taking the time to actually explain the rights rather than simply conducting a rote reading of the form. This Court has never held that rote reading of *Miranda* rights is constitutionally required, or that law enforcement officers may not take some additional time to explain those rights before obtaining a waiver. *See, e.g., Powell*, 130 S. Ct. at 1204; *Eagan*, 492 U.S. at 201–03. The *en banc* majority's analysis flies in the face of this Court's caselaw, making *it* an unreasonable application of clearly established federal law.

The majority's conclusion (as well as that of Chief Judge Kozinski in his concurrence) that Detective Riley's "deviat[ion]" from the Juvenile Waiver form in explaining Doody's right to counsel prior to and during questioning amounted to advising Doody that he "had the right to counsel if Doody was involved in a crime" (Pet. App. A at 36, 85–87), amounts to a strained and myopic reading of a cold transcript, devoid of the context in which the statement was made. Rather, Riley was simply telling Doody, once again, that the police did not necessarily believe that Doody had committed a crime but, nevertheless, he had the right to have counsel present prior to and during questioning. The Juvenile *Miranda* form reads as follows regarding that right:

> 3. **You have the right to have an attorney present prior to and during questioning.** (This means, if you want one, you are

> allowed to have a lawyer here before and during my questions to you. An attorney is a lawyer who will speak for you and help you *concerning the crime which we think you have done.*) Do you understand this right?

(Pet. App. E at 2, emphasis added.) Before reading Doody his *Miranda* rights and the explanatory parentheticals, Detective Riley had told Doody that the police did not feel that he was "necessarily" "responsible for anything." (Pet. App. F at 3.) It was in this context that, *after reading the right verbatim from the form*, Detective Riley varied from the parenthetical to convey that Doody had the right to counsel *regardless* of whether he was involved in the crime:

> [W]hat that means is that if you want one, *you're allowed to have a lawyer here before and during you know my questions to you*, okay. And then an attorney is a lawyer who will speak for you and help you concerning the crime or any kind of offense that ah *we might think that you or somebody else is involved in*, if you were involved in it, okay. Again, it [sic] not necessarily mean that you are involved, but if you were, than that's what that would apply to [sic] okay. And do you understand that?

(*Id.* at 10, emphasis added.)

Based upon the above colloquy, the majority and concurrence concluded that Detective Riley had effectively advised Doody that he had the right to have

counsel present prior to and during questioning *only* if he was "involved" in a crime. (Pet. App. A at 36, 83–87.) In doing so, they, myopically focused upon the statement, "Again, it [sic] not necessarily mean that you are involved, but if you were, then that's what would apply to [sic] okay," disregarding the context in which the statement was made, the fact that Riley had *just read* the right to counsel verbatim off the form in front of Doody, and that Doody had initialed it.

This Court has made clear that "reviewing courts are not required to examine the words employed 'as if construing a will or defining the terms of an easement.'" *Powell*, 130 S. Ct. at 1204 (quoting *Eagan*, 492 U.S. at 203). Yet, that is precisely what the majority and concurrence have done.

On the other hand, the Arizona Court of Appeals faithfully followed this Court's precedent, considering the entire colloquy in context and upholding the trial court's finding that Detective Riley "advised Doody of his *Miranda* rights in a clear and understandable manner and that Doody made a knowing and intelligent waiver." (Pet. App. C at 17–18.) "The inquiry is simply whether the warnings reasonably convey[] to [a suspect] his rights as required by *Miranda*." *Powell*, 130 S. Ct. at 1204 (quoting *Eagan*, 492 U.S. at 203). As pointed out by the dissent:

> A state court, earnestly trying to apply *Eagan* to the facts at hand, could reasonably conclude these combined warnings "touched all of the bases required by *Miranda*," and "reasonably convey[ed] to [a suspect] his rights as required

> by *Miranda*." *Eagan*, 492 U.S. at 203. The Supreme Court has not addressed a case in which an officer inadvertently makes an ambiguous elaborating statement that conflicts with otherwise-accurate spoken warnings. Nor has the Court indicated what effect simultaneously acknowledged, written warnings might have when the oral warnings are unclear. On this basis alone, the Arizona Court of Appeals' conclusion was not objectively unreasonable.

(Pet. App. A at 111, citation omitted.) Again, the only court to act "unreasonably" is the *en banc* majority.

The Arizona Court of Appeals faithfully and reasonably applied this Court's precedent in upholding the trial court's finding that Doody was adequately advised of and waived his *Miranda* rights. By concluding that the state courts' determination was "unreasonable" the *en banc* majority failed to afford that determination the deference it is due under the AEDPA, and has defied this Court's repeated admonitions to comply with the AEDPA.

B. VOLUNTARINESS FINDING.

1. *Applicable Law.*

This Court has held that involuntary statements[2] are inadmissible in evidence under the Due Process Clause of the Fourteenth Amendment. *See, e.g., Dickerson v. United States*, 530 U.S. 428, 433–34 (2000); *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973). In determining whether statements are involuntary under the Fourteenth Amendment a court considers the "totality of all of the circumstances—both the characteristics of the accused and the details of the interrogation" to determine "whether a defendant's will was overborne." *Dickerson*, 530 U.S. at 434 (quoting *Bustamonte*, 412 U.S. at 226). That same standard applies to statements of juveniles, *Fare v. Michael C.*, 442 U.S. 707, 725 (1979), with the caveat that "admissions and confessions of juveniles require special caution." *In re: Gault*, 387 U.S. 1, 45 (1967). Additionally, this Court has held that "coercive police activity is a predicate to finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

Although this Court has not held that "compliance with *Miranda* conclusively establishes the voluntariness of a subsequent confession," it has noted that "cases in which a defendant can make a colorable

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[2] The Court often refers to "confessions" rather than "statements" but the standard remains the same. In this case, there was no "confession," only largely self-exculpatory statements.

argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984); *see also Dickerson*, 530 U.S. at 444. More recently, a plurality of this Court wrote, "giving the [*Miranda*] warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver." *Missouri v. Seibert*, 542 U.S. 600, 608–09 (2004) (plurality opinion). When juxtaposed with the AEDPA's highly deferential standard of review, it is exceedingly difficult for a federal court to logically conclude that a state court's finding of voluntariness of *Miranda*-compliant statements is objectively unreasonable.

2. ***The Arizona Court of Appeals' Determination that Doody's Statements were Voluntary was not Unreasonable.***

In addressing Doody's voluntariness claim, the Arizona Court of Appeals stated that confessions are presumed involuntary, and that the State must establish that the defendant confessed "voluntarily and freely". (Pet. App. C at 7.) It noted that, in assessing the issues, it looked to the totality of the circumstances and determines if the defendant's will was overborne. (*Id.*) It further stated that, with respect to juvenile confessions, the "greatest care must be taken to insure that the admission was voluntary." (*Id.* at 8, quoting

State v. Jimenez, 799 P.2d 785, 790 (1990)).

The court rejected Doody's claim that the mere length of the interrogation required a finding that his statements were involuntary: "Other factors indicate that, despite the length of the interrogation, Doody confessed voluntarily." (*Id.* at 9.) It noted that Doody acknowledged, 2½ hours into the interrogation, that he had borrowed Caratachea's rifle. (*Id.* at 10.) It found that he admitted involvement in the Temple robbery about 6½ hours into the interrogation. (*Id.*) It found that the remainder of the time was devoted to Doody relating what he claimed happened, and discussing any possible involvement of the "Tucson Four." (*Id.*)

The court found that the tone of the interrogation was not coercive, but rather was in "a courteous, almost pleading style of questioning during most of the interview." (*Id.*) It noted that the officers testified that Doody remained alert and responsive throughout. (*Id.*) It found, "Our review of the audio tapes confirms the officers' testimony." (*Id.*) The appellate court noted that, because Doody did *not* testify at the suppression hearing, there was "no basis for assuming that he would have contradicted the officers' testimony." (*Id.*) The court found no evidence, even in the record of the trial, that called into question Doody's alertness. (*Id.*) It noted the officers' offer of food, drink and restroom privileges. (*Id.*)

The court then found that Doody had been asked if he wanted a parent present, and agreed to speak to officers without a parent. (*Id.* at 11.) It found that, in light of Doody's age and consent, the absence of a

parent did not make his statements involuntary. (*Id.*)

The court then, at some length, rejected Doody's argument that there had been any sort of improper promise upon which Doody had relied. (*Id.* at 12–13.) It specifically found that the "variety of approaches" and "tactics" the police used in interviewing Doody did not "overcome Doody's will." (*Id.* at 13–14.)

Additionally, as previously discussed, the court of appeals also found that "the officers advised Doody of his *Miranda* rights in a clear and understandable manner and that Doody made a knowing and intelligent waiver," including waiving the right to the presence of a parent. (*Id.* at 17–18.)[3]

In an attempt to undermine the Arizona Court of Appeals' eminently reasonable determination that Doody's statements were voluntary, the *en banc* majority redetermined the credibility of the law enforcement officers that testified at the suppression hearing, drew inferences adverse to the state courts' findings, parsed the state court record and viewed it through a Doody-colored prism, and seized upon three alleged "unreasonable determination" of "facts" mentioned by the Arizona Court of Appeals in its voluntariness analysis. (Pet. App. A at 50–58.) As pointed out by the dissent, "In light of the Arizona

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[3] Additionally, the state trial judge, who heard the witnesses testify during the course of the 12-day hearing and listened to the tape recordings of the interview, carefully considered the totality of the circumstances and found that Doody's statements were voluntary. (Pet. App. D at 2–5.)

courts' extensive findings and careful application of federal law, the best the majority can do is to mischaracterize the state court findings and re-evaluate the record." (*Id.* at 125.)

At bottom, the majority hangs its hat on the alleged "unreasonable determination" of what it claims are three "pivotal facts": (1) that the audio tapes of the interrogation confirmed the officers' testimony at the suppression hearing that Doody "remained alert and responsive throughout the interrogation and did not appear overtired or distraught"; (2) "the audio tapes reveal a courteous, almost pleading style of questioning during most of the interview"; and (3) "Doody admitted he had borrowed Caratchea's rifle at the time of the temple murders after approximately two and one-half hours of questioning." (*Id.* at 51, 54, 56.) Though these "facts" are not of significant consequence to the Arizona Court of Appeals' overall determination of voluntariness, (and certainly not "pivotal"), the *en banc* majority mischaracterizes the record and the substance of the Arizona Court of Appeals' recitation of those "facts."

As the dissent noted, contrary to the majority's parsed recitation of portions of the audio tapes, the Arizona Court of Appeals' finding regarding Doody's demeanor during the interview *is amply* supported by the tapes:

> The majority wants to interpret Doody's failure to answer certain questions as "unresponsive." The Arizona Court of Appeals obviously viewed his failure to immediately

> answer in a more sinister light; Doody could have been thinking up a tale explaining his admission that he was at the murder scene in a non-incriminatory fashion. Doody ultimately stated that he was at the temple but outside when the murders occurred.
>
> The finding that he was "alert and responsive" was not unreasonable, even in light of Doody's silence, for there is more to alertness than perpetual chatter. Doody could certainly have been pondering the consequences of truthfully answering the detectives' questions. Of course, silence may be indicative of inattention or unresponsiveness, but visual clues and physical demeanor must also be considered.

(*Id.* at 125–26.) That is *precisely* what happened in this case. Doody tried to throw the officers off his track with seeming cooperation and guile. When that was not working, the wheels in his head began to spin while he conjured up a story that distanced him from the robberies and murders. Eventually, he came up with the ridiculous story he told the officers. Of course, because the *en banc* majority opted to view the record in a light most favorable to Doody, it simply ignored this probability.

Next, the majority rejects the Arizona Court of Appeals' statements that "the audio tapes reveal a courteous, almost pleading style of questioning during *most* of the interview." (*Id.* at 54.) Again, the majority mischaracterizes the record, ignoring the qualifier

"most" in concluding that the officers were "far from courteous":

> The majority next deems unreasonable the finding that "the audio tapes reveal a courteous, almost pleading style of questioning during most of the interview." *Doody*, 930 P.2d at 446; Opinion at 2994. The majority reviews the tapes and scolds that the officers' tones were "far from pleasant." This was no tea party. The state court did not treat it like one. The officers were unquestionably persistent in seeking, and sometimes demanding, information. That is what we pay them to do. But it is entirely accurate to say the officers were "courteous, almost pleading" for "*most* of the interview" (emphasis added). Finding a courteous tone for *most* of the interview does not conflict with the fact that the officers were *sometimes* sarcastic, demeaning, and unpleasant.

(*Id.* at 127.) Again, rather than deferring on reasonable inferences to be drawn from the record, the *en banc* majority simply construed the audio tapes and the state courts' statements in a light most favorable to Doody.

Finally, the majority takes the court of appeals' statement that Doody admitted that he borrowed Caratchea's rifle "at the time of the temple murders" after 2½ hours of questioning out of context and mischaracterizes its significance. (*Id.* at 56.) The majority equates Doody's admission that he borrowed the rifle with an admission of "involvement" in the

crimes. (*Id.*) The Arizona Court of Appeals, however, drew a distinction between Doody's mere admission that he had borrowed the rifle and his *subsequent* admission that he was present during the robberies and murders:

> Although the entire interrogation lasted approximately thirteen hours, Doody admitted he had borrowed Caratachea's rifle at the time of the temple murders after approximately two and one-half hours of questioning. *Doody admitted he had participated in the temple robbery after approximately six and one-half hours of questioning*, and his description of the events at the temple spanned nearly two hours. During the remaining hours, the detectives reviewed Doody's testimony and probed for a connection to the Tucson Four.

(Pet. App. C at 9–10, emphasis added.)

Thus, the Arizona Court of Appeals recognized that Doody did not admit any "involvement" in the crimes until 6½ hours into the interview. Moreover, the significance of Doody's admission that he "borrowed" the rifle was that he had spent 2 hours adamantly denying that he *ever* borrowed it, not whether he borrowed it a month or so before the crimes were committed or on the day they were committed. Again, the majority's parsing of the record and mischaracterization of the Arizona Court of Appeals' statements evidence the lengths to which it went to undermine the state courts' determinations:

> Indefatigable in its mischaracterization of the state court's findings, the majority next claims that, "contrary to the findings of the Arizona Court of Appeals, Doody decidedly did not admit to involvement in the temple murders after two and one-half hours of questioning." Opinion at 2996. The Court of Appeals did *not* say Doody "admitted to involvement" after two and one-half hours. It said, "Doody admitted he had borrowed Caratachea's rifle at the time of the temple murders." *Doody*, 930 P.2d at 446. This is a reasonable finding of fact. Doody said he borrowed the rifle "close to the end of June." The murders occurred in August. Considering the Court of Appeals reviewed the case roughly five years later, "at the time" reasonably describes the time frame. It is disingenuous to re-write the state court's findings in order to declare them "patently unreasonable." Opinion at 2996. Although not conclusive, the inculpatory admission that he possessed the murder weapon before the temple invasion provided a strong basis for the officers to believe Doody had some involvement in the robbery and murders.

(Pet. App. A at 128–29.)

Having nit-picked through the voluminous state court record and the Arizona Court of Appeals' well-reasoned opinion, the *en banc* majority culled snippets out of context, redetermined the credibility of the law enforcement officers, and drew inferences adverse to those drawn by the state courts. Such a practice flies

in the face of the provisions of the AEDPA and the underlying principles of federalism and comity. However, even accepting the majority's biased view of the record, it *still* fails to demonstrate that the state courts' resolution of the voluntariness issue was objectively unreasonable:

> The majority spins a good yarn, but the state court also told a good story. Even federal judges can't read Doody's mind or travel back in time. And, as the Supreme Court has told us, "The more general the rule, the more leeway courts have in reaching outcomes." *Yarborough v. Alvarado*, 541 U.S. 635, 664 (2004). This is precisely the kind of debatable application of a "general standard" where finality and respect for the independent judgment of the state courts counsels the highest deference on federal habeas review. *See Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009). I would therefore let stand the state court's finding that the confession was voluntary.

(*Id.* at 81–82, Kozinski, C.J., concurring.)

The *en banc* majority clearly failed to follow this Court's repeated admonition that federal courts (particularly the Ninth Circuit) abide by the provisions of the AEDPA and accord state court legal and factual determinations the deference they are due.

CONCLUSION

For the reasons set forth above, Petitioner requests that this Court grant certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted

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APPENDICES

United States Court of Appeals,
Ninth Circuit.

Johnathan Andrew DOODY, *Petitioner-Appellant*, v. Dora B. SCHRIRO; Megan Savage; Attorney General of the State of Arizona, *Respondents-Appellees*	No. 06-17161 D.C. No. CV-98-00528-EHC OPINION

Appeal from the United States District Court for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
June 23, 2009.—Seattle, Washington

Filed Feb. 25, 2010.

Before: Alex Kozinski, Chief Judge, Mary M. Schroeder, B. Fletcher, Harry Pregerson, Stephen Reinhardt, Pamela Ann Rymer, Andrew J. Kleinfeld, Sidney R. Thomas, Kim Mclane Wardlaw, Richard C. Tallman, And Johnnie B. Rawlinson, Circuit Judges.

Opinion By Judge Rawlinson;
Concurrence By Chief Judge Kozinski;
Dissent By Judge Tallman

COUNSEL

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RAWLINSON, Circuit Judge:

This case emerged from a horrendous crime—the murder of nine individuals, including six monks, inside a Buddhist temple. The ensuing investigation ensnared Petitioner Johnathan Doody, a seventeen-year old high school student. Although Doody eventually confessed to participating in the nine murders, he now challenges his confession, asserting that the *Miranda*[1] advisements he was given were inadequate and that his confession was involuntary. We agree on both counts. Specifically, we conclude that the advisement provided to Doody, which consumed twelve pages of transcript and completely obfuscated the core precepts of *Miranda*, was inadequate. We also hold that nearly thirteen hours of relentless overnight questioning of a sleep-deprived teenager by a tag team of officers overbore the will of that teen, rendering his confession involuntary.

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[1] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), requires that, prior to questioning, a suspect be apprised of his constitutional rights to remain silent and to consult an attorney.

I. BACKGROUND

"On the morning of August 10, 1991, members of the Wat Promkunaram Buddhist Temple discovered nine bodies inside the temple (the temple murders). The victims, including six Buddhist monks, lay face down in a circle, each shot in the head." *State v. Doody*, 187 Ariz. 363, 930 P.2d 440, 443 (1996). Temple living quarters were ransacked, and personal property was missing. *See id.*

Approximately one month after the temple murders, Phoenix detectives received an anonymous tip implicating four men from Tucson (the Tucson Four). During interrogations, the four suspects made inculpatory statements, resulting in murder charges against them.[2] *See id.*

The police identified the murder weapon as a Marlin Model 60 .22 caliber rifle (Marlin rifle). *See id.* Investigators received a report from Luke Air Force Base that a military policeman had discovered a Marlin rifle while searching a vehicle in an unrelated incident. *See id.* The rifle was recovered from its owner, Rolando Caratachea (Caratachea), and identified as the temple murder weapon. *See id.* When confronted, Caratachea denied involvement in the temple murders. He steered the investigators to Doody and another minor, Alessandro Garcia (Garcia), whom he reported had borrowed the rifle

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[2] All charges against the Tucson Four were subsequently dismissed. The State has never disputed that the Tucson Four's confessions were false.

shortly before the murders. *See id.*

Police officers approached Doody on October 25, 1991, at a high school football game, where Doody was participating in a flag ceremony as a member of the high school Reserve Officers Training Corps (ROTC). Doody voluntarily accompanied the police officers to the station for questioning.

Doody's interrogation began at 9:25 p.m. and concluded at 10:00 a .m. the next day. *See id.* at 444. Prior to commencing the interrogation, Detective Riley purported to advise Doody of his constitutional rights as required by *Miranda.* His recitation of *Miranda*'s basic warnings consumes twelve pages of transcript, largely a byproduct of the detective's continuous usage of qualifying language. The *Miranda* form designed to be used when questioning juvenile suspects contained the following uncomplicated advisements:

> 1. **You have the right to remain silent.** (This means that you do not have to talk to me or answer any questions about this offense. You can be quiet if you wish.) ...
>
> 2. **Anything you say can and will be used against you in a court of law.** (This means that anything you tell me, I can use later against you in court ...) ...
>
> 3. **You have the right to have an attorney present prior to and during questioning.** (This means, if you want one, you are allowed to

> have a lawyer here before and during my questions to you ...) ...
>
> 4. **If you cannot afford an attorney, you have the right to have one appointed for you prior to questioning.** (This means if you do not have the money to get a lawyer, if you wish, one will be given to you free of charge before you are questioned.) ...

Juvenile *Miranda* Warnings Form (October 25, 1991). What began as the reading of a single-page *Miranda* form morphed into a twelve-page exposition that negated the intended effect of the *Miranda* warning.

Detective Riley began by informing Doody that the warnings were merely a formality that Doody should not take out of context:

> Ah, what I'd like to do first though Jonathan since we're in kind of a formal setting and things like that and because DAVE [Munley's] a police officer and I'm a police officer and things like that ah sometimes some of the questions that we get into are, are a little bit sensitive and ah things like that. Ah, and what I'd like to do is before we, we go into that is ah, read something to you ah, and so that you understand some of the protections and things that ah, that you have. It's not meant to scare you or anything like that, ah, don't, ah, don't take it out of context, okay.

...

> Ah, I'm sure you've heard this thing and you've heard it said on t.v. and things like that and it's not quite like t.v. portrays it ah, *it's a little more, little less technical and a little less heavy if you want to put it ah that way ... What, what, it's called is a Miranda warning okay. Have you heard that before?*
>
> Doody: *No.*
>
> They call it Rights on t.v., okay. What, what that is and basically all that is Jonathan is, it's not necessarily something that is, like on t.v. where they portray it when somebody's ah guilty of doing something, ah, we read these things to people on somewhat of a regular basis, whether they're responsible for doing something or not, okay. So I don't want you to feel that because I'm reading this to you that we necessarily [sic] that you're responsible for anything, it's for your benefit, it's for your protection and for our's [sic] as well, okay?

Doody Interrogation Transcript, Tape 1, pp. 2-4 (emphases added).

Detective Riley then informed Doody that he was reading the *Miranda* warnings verbatim from a form. *See id.* at p. 8. However, the detective deviated significantly from the form while informing Doody of his right to counsel. He stated:

> Okay, and the next one states that you have the right to have an attorney present prior to and during questioning, and what that means [sic] that if you want one, you're allowed to have a lawyer here before and during you know my questions to you, okay. And then an attorney is a lawyer who will speak for you and help you concerning the crime or any kind of offense that ah we might think that you or somebody else is involved in, if you were involved in it, okay. Again, it [sic] not necessarily mean that you are involved, but if you were, then that's what that would apply to okay.

Id. at p. 10.

The interrogation commenced with casual questions from both Detective Riley and Detective Munley about Doody's roommates and friends, including whether any of them owned guns. Doody volunteered that his friend Caratachea owned a gun, but denied that he ever borrowed or shot the gun. The two detectives then switched the focus of the questions to the temple murders, asking Doody to detail his whereabouts at the time of the murders and to describe how he became aware of the crime. Doody responded that on the night of the murders, he went to a movie with a friend and returned home. The two officers followed up by asking additional questions about the temple, Doody's prior visits to the temple, and the victims.

Approximately one hour into the interrogation,

Detective Riley paused to lecture Doody about the importance of telling the truth. He also asked a pointed question: whether Doody or anyone Doody knew had ever borrowed Caratachea's rifle. Doody denied that he had, but stated that Garcia might have done so. At that point, Detective Riley apprised Doody that there were some things about the gun that he knew Doody was aware of, and he urged Doody to come clean.

Detective Riley again asked Doody about his whereabouts when the murders occurred and whether he knew anything about the murders other than what was reported in the news. When Doody once more denied any knowledge of the murders, Detective Riley repeated his warning about the importance of Doody telling all, and he informed Doody that the detectives knew Doody was lying when he denied borrowing Caratachea's rifle. In response, Doody reiterated that he never borrowed the rifle, but Garcia might have.

Following Doody's repeated negative response to the question of borrowing Caratachea's rifle, both detectives proceeded to lecture Doody on the importance of his telling the truth. In the midst of the lecture, the two detectives confronted Doody with their "knowledge" that Doody and at least one other person borrowed the rifle. They demanded information confirming their knowledge, telling Doody that "its [sic] so important for you, for you to tell us. *I mean you have to tell us. You have to.*" Doody Interrogation Transcript, Tape 3, p. 27 (emphasis added).

Almost immediately after the two detectives told Doody he *had* to tell them about borrowing the rifle, Doody obliged. He told the two detectives that he and Garcia borrowed the rifle well before the temple murders. This admission prompted several more sternly couched lectures on the importance of telling the truth, and the detectives' knowledge that Doody was lying. The detectives also increased the pressure on Doody by informing him that Caratachea's rifle was the murder weapon. Nevertheless, Doody maintained that he returned the rifle to Caratachea prior to the murders. He continued to deny knowledge of, or involvement in, the murders in the face of repeated questions and accusations that he was withholding information from the detectives.

In the middle of the night, Doody became virtually non-responsive to the detectives' questioning, even though a third detective, Detective Sinsabaugh, who had interviewed Doody in September, joined the tag team. From that point, the pressure intensified. Detective Riley began with:

> Why if you didn't kill anybody, then what is what is keeping you from making people understandable [sic] believe that. 'Cause if you didn't kill anybody, doing what you're doing right now isn't going to convince anybody ... They're gonna say and this is only speaking it out common sense fashion how people normally perceive things, is it if you didn't kill anybody why is he lying, why won't he tell what happened, there is [sic] got to be a reason for that; and the reason that most people

> would come to is that you probably kill [sic] them and it is won't admit it. So we can get pass [sic] that point and deal with the fact that he didn't kill anybody, but this is why your problem in coming across with what he knew and reasons were this and this and hey! I think there [sic] a probably pretty good reasons[sic] otherwise you wouldn't have such a problem Jonathan, but help us understand that, and by understanding it you're going to help yourself out tremendously 'cause we have to know. Com'mon!

Doody Interrogation Transcript, Tape # 8, pp. 1-2. Doody responded, "I don't know anything else." *Id.* at p. 2.

Detective Sinsabaugh chimed in: "You know me don't you Jonathan? How'ya doing my friend?" *Id.* at p. 6. The detective instructed an unresponsive Doody:

> Remember we talked about honor. I need your help on this one. I know what's up. I need you to help on this one, okay? You got a duty to help us Jonathan; I know exactly what went down, my man, and you got a duty to help us and we can work this thing out together and I'm coming to you straight up Jonathan. I'm serious. *These guys* [the other two detectives] are trying to give you an opportunity Jonathan for you to help us to be *on our team* and that's why they're spending this time with you. Just like that night I talked to you, it's no game

> now Jonathan. I know you though Jonathan, I know ... your family. I know where you have been raised, and I don't think Jonathan Doody is a cold blooded killer. These guys were cowards Jonathan. You got mixed up with some dumb punks, and you gotta help us on this Jonathan. You gotta help us on this 'cause it's no game now. I mean that you gotta help us on this. This is not a game; I'm not playing with you Jonathan. I know your family and everything. Please help me on this Jonathan. We can we can talk and we'd see how we can ever work this thing out, but you gotta be straight up front with me. If you lie to us Jonathan, then we're not gonna be able to believe the truth. If you lie to us, I'm not gonna be able to believe whether or not you are [sic] killer and I don't believe that Jonathan and that's why I took the time to come in and talk to you, 'cause I care about you man. Let it out, Jonathan. Now is the time let it out. Let it out, Jonathan. Tell's [sic] us what's up; take some pride in yourself we'll, we'll work it out Jonathan, but it's not gonna help leaving it in. I need to know your part; we already know what went down Jonathan. Help me on this one.

Id. at pp. 6-7 (emphases added).

Besides reiterating that he didn't do anything, Doody was non-responsive. The three detectives continued in tandem:

Detective Munley: Tell us what happened. We gotta hear it from you. Get it all cleared up Jonathan, you can do it. It has to come out Jonathan.

Detective Sinsabaugh: Jonathan now is the time.

Detective Munley: Go ahead Jonathan please. You're not afraid to take stands, just get it out, just get it out ...

Detective Munley: Do it Jonathan; I can help you. Let it out Jonathan.

Detective Sinsabaugh: Trust me on this one. Jonathan. Whose plan was it Jonathan? Tell me Jonathan, whose plan was it? I'll work with you on it. Go ahead, Jonathan, go ahead. Help us on this. Detective Riley: Jon you can do it. Whose idea was it?

Detective Sinsabaugh: Jonathan let it out, let it out take a deep breath let it out now. Let it out and tell us what happened.

...

Now is the time, let it out. Get it out of you, it's a new beginning for you.

...

Jon, this is bull shit. Get it out Jonathan

'cause then I'm not gonna believe you when you do tell us we, we know what's up. Now let it out now, and we'll work together on it.

Detective Munley: Jonathan, who are we talking about here? You gotta take this position now. You better take a hold of this now.

Detective Riley: This is your time, Jon. This is your opportunity get [sic] it out.

Detective Sinsabaugh: Jonathan, I know you're involved. I don't wanna go out that door; I don't wanna believe other one's, other people's story. I want it from you first hand. Jonathan, it's time. I'm serious, it's time.

...

Take a stand. Be a man ...

Detective Riley: You have to Jon ...

...

Detective Sinsabaugh: Now come clean with me Jonathan; come clean.

...

Detective Munley: Rollie was involved, wasn't he?

Detective Riley: Com'mon Jonathan, it's not that difficult. Either he was or he wasn't. Was he? Was he or wasn't he involved? Jonathan was he?

Doody: I don't know.

Detective Riley: Yes, you do know. Was he?

Detective Sinsabaugh: Jonathan, I'm going out this room. I'm gonna talk to other people. I thought for surely [sic] I could come to you; you're not thinking in your interest Jonathan. How we talked about the honor; I don't see any of that honor my man.

Detective Riley: Try, you can do it. Gotta get it, you gotta release it Jonathan. It's not gonna go away. Man you gotta get it out. Just go ahead and say it. It's all in [sic] the tip of your tongue. Just let it out Jon ... [W]as Rollie involved? Jonathan it's not that hard. Either he was or wasn't. Com'mon, do it. Do it now. Either he was or he wasn't. Was he involved? Yes or no? Com'mon, com'mon! ...

Detective Munley: Get it out ...

Detective Sinsabaugh: I'm with you. I'm with you. You gotta help me on this one. We gotta make this right Jonathan. This's no game Jonathan; I'm being honest with you.

Detective Munley: He was involved, wasn't he

Jon?

Detective Sinsabaugh: It's your side of the story.

Detective Munley: He was, wasn't he.

Detective Sinsabaugh: Com'mon Jonathan.

Detective Munley: Jonathan, look at me; he was, wasn't he? Go ahead Jonathan.

...

Detective Sinsabaugh: You were involved Jonathan. You were involved.

Detective Munley: We gotta know the extent of your involvement. We gotta have your version Jon.

Detective Sinsabaugh: Man, you gotta get it out.

Detective Munley: Tell it, Jon.

Detective Riley: Jonathan can you honestly sit there and tell myself and Dave and Rick right now that you were not at that temple.

Detective Sinsabaugh: No, 'cause Jonathan Doody doesn't lie.

Detective Munley: Jonathan, can you?

Detective Riley: Com'mon this is not that hard. You know what we've talked about throughout this whole conversation. If you're there, we can deal with that; but we gotta know, we gotta hear it from you. You have to tell us. Yes or no? Were you or weren't you? Yes or no? Jonathan, com'mon. Yes or no? Yes or no? Yes or no? Yes or no? It's real simple. Were you or weren't you. Just tell me, yes or no. Com'mon yes or no, it's real simple.

...

Detective Sinsabaugh: Join the team. Let's work this thing out together. I'm not gonna tell you, you can't Jonathan. Let's straighten this shit up.

...

Doody: (Murmur)

...

Detective Sinsabaugh: Jonathan do it.

Detective Riley: We have to know; you have to let us know. If you don't, let us know know [sic] body else is gonna do that for you. Either you tell us you were or weren't, it's really simple. I know it's a struggle right now, but you have to let us know that. Whether or not you were there. Simply yes or no. What is it, which one is it? Com'mon, take control right

now.

Detective Sinsabaugh: Answer Jonathan, answer.

Detective Munley: You can do it Jon.

...

Detective Munley: Jon, it's not the end of the world. It's not the end of the world.

...

Jonathan you can do it.

Detective Riley: Please! Jonathan, com'mon. You can deal with this; you can take control of this situation. The way to start with that is to do this now by telling us whether or not you were there. Were you or not there? Jonathan Please tell us now. Let us help you ...

Detective Munley: Get it out ...

Detective Riley: Give us the opportunity.

Detective Munley: Get it out. Go ahead.

Detective Riley: Grab a hold of this opportunity. Let us help you. Like Rick's been telling you, trust us.

Detective Sinsabaugh: Jonathan, Jonathan,

Jonathan look at me. This is flat out bull shit man. What what what what'd, you been brought up better than this. What the hell does this stand for, Okay? Are you gonna cover for bunch [sic] of cowards. I'm trying to convince these people Jonathan that you didn't kill anybody. You got something in here, and you you're sitting here playing a game and I'm not gonna put up with it. You're gonna sit there and cover for bunch [sic] of cowards. I think Jonathan, I'd come to you straight up and I'm gonna give [sic] chance to answer and I want you to come clear with this. Don't cover for these guys. They're cowards, Jonathan. Tell me.

Doody: I can't.

Detective Sinsabaugh: Why? I'll work with you, why? Why Jonathan? Why? Talk to, I'd talk to you the other night Jonathan; we can talk. Me and you can talk Jonathan ... don't freeze up on me man. You freeze up on me like this, I can't talk to you. Talk to me. Why can't you and we'll work it out. Just sit down and discuss this.... Jonathan, take charge man. Your [sic] soldier man, you don't, you you don't you can say what's on your mind and tell me Jonathan. Tell me. Tell me so I can work this out with you. Go ahead my man, tell me. Tell me, trust me my man. Trust me. Trust me so we can work [sic] out; I need your help Jonathan. How did you get involved in it and talk. How did you get involved in it? We'll

> work it out Jonathan, we'll work it out. I'm worried about your family, too. We'll work it out. You need to help me Jonathan. Jonathan, Jonathan don't. You told me you can't, now why? Jon no, Jonathan tell me. Why? Let's work it out together. Jonathan look at me my man, trust me on this. Let's work this thing. Why? If you wanna say it Jonathan, why? Why? I I care about you Jonathan; you're [sic] family wanna know why ...

Id. at pp. 10-19.

Between 3:15 a.m. and 3:56 a.m., after making a brief comment about there not being a threat to his family, *See* Doody Interrogation, Tape 9, p. 1, Doody again became silent. The detectives continued without any response from Doody:

> Detective Sinsabaugh: Jonathan, who did they threaten [sic] let it out? I know what's up Jonathan. Tell me about it lets [sic] work this out. Jonathan I need your help to prove that your [sic] not a killer Jonathan. You went there it went to shit Jonathan it wasn't your idea. You just got messed [sic] with the wrong guys, Jonathan look at me. Don't sst [sic], what's the problem? Jonathan tell me. Let it out, who, you said not me who? Who Jonathan? Jonathan be a man about this. Tell me.
>
> Detective Riley: Who's [sic] ideal [sic] was it Jonathan?

Detective Sinsabaugh: Tell him Jonathan. Tell him Jonathan, who's [sic] ideal [sic] it was. Let's get this out, there you go ...

Detective Sinsabaugh: Ideal [sic] was it?

Detective Munley: Go ahead Jonathan. It's easy, who's [sic] ideal [sic]? Let it out Jonathan. Go ahead.

Detective Sinsabaugh: Jon, Jon, Jon trust me on this, Jonathan. It's the only way we can work it out is if you're up front Jonathan. Now I talked to you tonight, the other time we talked you you you intelligent [sic] help us on this talk to us.

Detective Munley: Who's [sic] idea was it Jonathan?

Detective Sinsabaugh: Jonathan I'm gonna have to leave the room are you gonna help me on this? Are you gonna trust me on this? You can't trust those guys. You can trust me now tell me Jonathan. Jonathan you're wasting time, now tell me. You want to tell us, so let's just tell it now. Detective Munley: Tell Jonathan.

Detective Sinsabaugh: Jonathan, Jonathan who's [sic] ideal [sic] was it? Jonathan you just said it, who's [sic] ideal [sic] was it?

Detective Munley: OK Jonathan.

Detective Sinsabaugh: You're gonna cover for a cold blooded killer?

Detective Munley: Jon go ahead and let it out. Go ahead Jon.

Detective Sinsabaugh: Jon Jon Jon Jon are you gonna cover for a cold blooded killer, now let it out.

Detective Munley: Go ahead Jon. Get it out Jon. Were you there? Jon.

Detective Sinsabaugh: Jon Jon tell tell me so I know what we're up against. Why are you scared to tell us? Huh, Jon Jon you got to answer me why are you scared to tell us, answer me. No Jon why are you scared to tell us? I'm not gonna let you do this to yourself, why are you scared to tell us? No, Jon you're gonna answer me, why are you scared to tell us? I'm concerned about ya and I'm I'm gonna stay here until I get an answer, why are you scared to tell, let me help you on this Jon. Jon, why are you scared to tell us? Huh? Jon, Jon answer me. Why are you scared to tell us, I'm not gonna let you do this. Now you you start talking to me. Tell us Jon. Jon Jonathan tell us.

Detective Munley: Let it go. You just said it.

Detective Sinsabaugh: Trust me on this [Jonathan]. This is the only way.

Detective Munley: Go ahead Jon. Get it out Jon, just get it over with it has to come out. It has to come out, go ahead. Go ahead Jon.

Detective Sinsabaugh: Jon look what you're holding inside you want to tell us just tell us. Jon, Jon would you tell me? Look at me Jon, Jon don't look away, look at me Jon you're a soldier tell me what's up. Jon no no no tell me Jon talk to me Jon. Jon no no this guy it's not you're not gonna cut it that way man, you're gonna be a man about it. You're gonna talk to me Jon.

Detective Riley: Who are you afraid of Jon?

Detective Sinsabaugh: You you gonna get this out in the open now Jon that isn't going to buy it, you're you're you're an ROTC you're a soldier now start talking to me Jon don't sit there like that talk to me. Jon you remember what's my name? What's my name? What's my name Jon? What is my name? What is my name Jon?

Detective Riley: Don't you remember his name?

Detective Sinsabaugh: Do you remember me talking to you at school? I called you at school, your counselor and you called me? Do you

remember yes or no?

Doody: Yes.

Detective Sinsabaugh: OK, why is that so hard? Yeah I talked to him a couple of months maybe. Jon Jon do you want to talk or not?

Doody: I'll pull up a chair.

Detective Munley: Just get it out.

Detective Sinsabaugh: Jon, excuse me. What's the deal are you gonna talk to me or not? Who am I Jon? What's my name? Well talk, what is my name Jon? You can't remember it? You remember me talking to you?

Doody: Yes.

Detective Sinsabaugh: OK speak up OK we're men now. Could you remember me talking to you?

Doody: Yes.

Detective Sinsabaugh: OK speak up, Jon. OK I'm talking you [sic] straight up like a man, do you remember me talking to ya?

Doody: Yes.

Detective Sinsabaugh: OK I, you need to speak up through [sic] when you're talking to me.

What is my name? You you remember my name? Yes or no, do you remember my name?

Doody: Yeah.

Detective Sinsabaugh: OK, what's my name?

Doody: Richard Sinsabaugh.

Detective Sinsabaugh: Well why is that so hard? I'm I'm here for ya, you got to talk, why why you act [sic] that you don't talk like that? Tell us these guys are trying to help you now what's up? Jonathan, that's it were [sic] talking now. Now, I know you're involved Jonathan now now you gonna help me on this thing. So what's the deal, what don't don't start this stuff talk to me OK, lets [sic] talk about the problem what problem are we having right now? What's the problem? You say you're afraid of something, what are you afraid of?

Doody: I'm not afraid of anybody.

Detective Sinsabaugh: OK what's the problem talk to me that's what we need to talk about what's the problem? You're afraid of the family? Right?

Doody: No.

Detective Sinsabaugh: What? Talk to me that's what I need, so I can discuss it with ya what?

Then what? Jon tell me, what?

Doody: I'm afraid for somebody.

...

Detective Sinsabaugh: Oh, are you afraid Vickie find [sic] out about you? What are you afraid of? I'm not a mind reader Jonathan you got to tell me, tell me. It's not that hard, tell me Jonathan seriously, tell me. OK? I talked to you Jonathan my God you're an intelligent guy, what's the deal tell me, you're afraid for Vickie what what are you afraid of Vickie for? What are you afraid of of for Vickie? Tell us so we can get over this hurdle this Vickie. Hurdle ... what's the problem? Jon Jonathan tell me what's the problem? Did you kill anyone there Jonathan? Look me in the eye yes or no, did you kill anyone there?

Doody: No.

Detective Sinsabaugh: I can't hear you Jonathan, did you kill anyone there takes [sic] a stand.

Doody: No.

Detective Sinsabaugh: OK, why is it that [sic] so hard to say is it because you might of, I don't think you killed anyone Jonathan, but I know you were there. Jonathan I'm gonna ask you this and don't give me information any

doubts [sic] on it, cause I don't think you killed anyone, did you kill anyone at the Temple?

Doody: No.

Detective Sinsabaugh: Why is that hard to answer? You were there though Jonathan, right? Right? Jonathan, were you at the Temple? Jonathan, were, I'm asking you flat out, were you involved? Jonathan were you involved, don't lie to me yes or no? Tell me Jonathan, were you involved, I need to know so we can get over this and work on it. Were you involved? Tell me Jonathan. You were involved Jonathan, tell me. I know that but I need to know if you killed anybody, you said you didn't kill well how do I know if you're lying to me about this? Were you involved? Jonathan were you involved? Answer me, answer me Jonathan. Jonathan answer me. Answer me. What what's the problem answer me Jonathan what what are we going through all this, we want to work things out, what's the difference, we all [sic] ready know what's up Jonathan you're here, ya know we took you out of ROTC, this isn't a game OK you need you [sic] to help us out on this. And why you doing this, this doesn't look like a guy who wants to help us out, what's the problem? Were you involved?

Interrogation Transcript, Tape 9, pp. 1-8. Doody finally responded, "Yes." *Id.* at 8.

Over the course of several more hours of interrogation, Doody gave the detectives the "confession" they sought. Doody informed the detectives that Caratachea and Garcia approached him with a plan to conduct a war game with the goal of surrounding the temple without triggering the security system. Doody went to the temple with Caratachea, Garcia, and two others, George Gonzalez (Gonzalez) and his friend. Doody explained that he had no intention of entering the temple but, once past the security sensors, he followed the others inside. According to Doody, Caratachea, Garcia, Gonzalez, and the other participant ransacked the temple's living quarters and gathered the victims into the main room. After one of the monks recognized Gonzalez, Doody was ordered to go outside and confirm that the walls were sound-proof. Doody maintained that the shootings occurred while he was outside and that he did not know who fired the shots. *See Doody*, 930 P.2d at 444.

On the same night that Doody was interrogated, Garcia was also questioned. Garcia identified Doody as the mastermind of the plan to rob the temple. Garcia's version of events was that once they were inside the temple, Doody was determined to leave no witnesses. According to Garcia, he attempted to persuade Doody not to shoot the victims but was unsuccessful. Instead, Doody shot each victim in the head with a rifle Doody borrowed from Caratachea. Garcia stated that he and Doody were the only participants in the murders.

Investigators subsequently searched Garcia's

home and discovered several items taken from the temple. They also recovered a shotgun that matched shells from the crime scene. The two confessions and the evidence collected at Garcia's home resulted in dismissal of all charges against the Tucson Four from whom the police had previously obtained confessions. Doody and Garcia were subsequently charged with the murders. *See id.*

Prior to trial, Doody and Garcia filed motions to suppress their confessions. *See id.* At the suppression hearing, Detective Riley described Doody as "very polite, attentive, and just overall pleasant." Suppression Hearing Transcript, October 27, 1992, pp. 68-69. Detective Riley described using "a standard issue juvenile *Miranda* form issued by the office" to inform Doody of his *Miranda* rights. *Id.* at 77-78. According to Detective Riley, he went through the form with Doody, who initialed the applicable areas of the form. Detective Riley stated that Doody was "very attentive. [Doody] made eye contact with [Detective Riley] as [he] spoke to [Doody] and, again, was polite and courteous." *Id.* at 81. Detective Riley stated that Doody did not display any doubt while answering the questions. He estimated that it took fifteen to twenty minutes to administer the *Miranda* warnings.

When asked if Doody appeared tired during the interrogation, Detective Riley responded, "I'd have to say for the most part no. [Doody] didn't really display any real overt sign of being fatigued or tired." *Id.* at 89. Detective Riley testified that he used a "[q]uiet and calm" voice when he questioned Doody. *Id.* at 90.

Detective Riley confirmed that there were long periods during the interview when Doody remained silent while Detective Riley kept asking questions. During these periods, Doody's "posture began to deteriorate. His attentiveness also deteriorated. And his eye contact dropped to where he would look at the ground for long periods of time. He would clinch his beret in his hand." Suppression Hearing Transcript, October 28, 1992, p. 35. Detective Riley agreed that certain periods could be described as an "impasse." *Id.* at 37. Detective Riley acknowledged that the transcripts reflected a four-page speech in which he was trying to get Doody to provide additional information. After this "four-page ... speech," Doody responded, "I don't know anymore." *Id.* at 43.

Following the suppression hearing, the trial court denied both Garcia's and Doody's motions to suppress. *See Doody*, 930 P.2d at 444. Garcia entered into a plea agreement, "pursuant to which the state agreed not to pursue the death penalty and Garcia agreed to testify against Doody." *Id.* "In addition, Garcia pled guilty to nine counts of first degree murder and one count of burglary in connection with the temple murders, as well as one count of first degree murder in an unrelated homicide (the Cameron murder)." *Id.*

At Doody's trial, Garcia testified consistent with his statements to the investigators. *See id.* Doody was not allowed to cross-examine Garcia regarding the Cameron murder or other unrelated and

uncharged offenses Garcia committed with Caratachea, "including a series of burglaries and conspiracy to commit murder and armed robbery (the Cruz offenses)." *Id.*

The jury ultimately convicted Doody on all counts. However, the verdict forms revealed that the jury premised Doody's first degree murder convictions on felony murder rather than on premeditated murder. *See id.*

Doody appealed his convictions to the Arizona Court of Appeals. *Id.* at 445. Addressing Doody's confession, the Court of Appeals observed that "the troublesome length of Doody's questioning does not, in itself, establish that the officers overcame Doody's will to resist confessing." *See id.* at 446 (citation omitted). The Court of Appeals opined:

> Other factors indicate that, despite the length of the interrogation, Doody confessed voluntarily. Although the entire interrogation lasted approximately thirteen hours, Doody admitted he had borrowed Caratachea's rifle at the time of the temple murders after approximately two and one-half hours of questioning. Doody admitted he had participated in the temple robbery after approximately six and one-half hours of questioning, and his description of the events at the temple spanned nearly two hours. During the remaining hours, the detectives reviewed Doody's testimony and probed for a connection to the Tucson Four.

Id.

Additionally, the Court of Appeals concluded that "[a]lthough Doody characterizes the tone of the interrogation as coercive, the audio tapes reveal a courteous, almost pleading style of questioning during most of the interview." *Id.* The Court of Appeals noted that "[e]ach of the officers involved in the interrogation testified at the suppression hearing that Doody remained alert and responsive throughout the interrogation and did not appear overtired or distraught. Our review of the audio tapes confirms the officers' testimony." *Id.* The Court of Appeals found that there was "no evidence that calls into question the testimony that Doody remained alert and responsive." *Id.*

The Court of Appeals rejected Doody's argument that the police officers pressured him into a confession:

> The officers used a variety of approaches in questioning Doody. They emphasized Doody's experience in the high school honor guard and color guard and appealed to his sense of honor as a soldier. At impasses in the interview, the police captain entered the interrogation room and likened himself to a commanding officer in the military, encouraging Doody to trust and confide in him. The officers feigned empathy with Doody's situation and pleaded with Doody to prove his innocence. The officers also indicated to Doody that other suspects had

> implicated him in the temple murders and that Doody's best defense would be to explain his version of the events.

Id. at 447. The Court of Appeals held that "[t]he tactics, though deceptive in part, were not so egregious as to overcome Doody's will and ... the record contradicts Doody's claim on appeal that the method of interrogation induced him to confess." *Id.* at 447-48.

The Arizona Court of Appeals also determined that the police officers properly provided Doody with the requisite "clear and understandable" *Miranda* warnings. *Id.* at 449. Specifically, the Court of Appeals concluded that "[t]he officers read each warning from a standard juvenile form and provided additional explanations as appropriate." *Id.*

Doody challenged the Arizona Court of Appeals decision in a federal habeas petition, which was denied. However, the district court granted a certificate of appealability concerning the voluntariness of Doody's confession and the adequacy of the *Miranda* warnings given Doody.

In *Doody v. Schriro*, 548 F.3d 847 (9th Cir.2008), a panel of this court reversed the district court's denial of Doody's habeas petition. Appellee Dora Schriro filed a petition for rehearing en banc, which we granted. *See Doody v. Schriro*, 566 F.3d 839 (9th Cir.2009).

II. STANDARDS OF REVIEW

"We review the federal district court's decision to deny [Doody's] habeas petition de novo." *DeWeaver v. Runnels,* 556 F.3d 995, 997 (9th Cir.2009) (citation omitted).

> [B]ecause [Doody] filed his habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), we must deny the petition unless the state court's adjudication of [Doody's] claims resulted in a decision that was either (1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Mendez v. Knowles, 556 F.3d 757, 767 (9th Cir.2009) (citation omitted).

Under AEDPA, "[t]he state court unreasonably applies clearly established federal law if it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." *DeWeaver,* 556 F.3d at 997 (citations and internal quotation marks omitted). "Under applicable federal habeas law, state court findings of fact are presumed

correct unless rebutted by clear and convincing evidence or unless based on an unreasonable evidentiary foundation." *Gonzalez v. Pliler,* 341 F.3d 897, 903 (9th Cir.2003) (citations omitted). We review the decision of the Arizona Court of Appeals as the last reasoned state court decision on the matter. *See Holley v. Yarborough,* 568 F.3d 1091, 1098 (9th Cir.2009). We apply the unreasonable application prong of AEDPA because the Arizona Court of Appeals identified the applicable governing rule for each issue.

III. DISCUSSION

A. Adequacy of the Miranda Warnings

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda,* 384 U.S. at 444. "[T]o reduce the risk of a coerced confession and to implement the Self-Incrimination Clause, [the Supreme Court] in *Miranda* concluded that the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored[.]" *Missouri v. Seibert,* 542 U.S. 600, 608 (2004) (citations and internal quotation marks omitted). " *Miranda* conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any

statements obtained." *Id.* (footnote reference omitted). " *Miranda* addressed interrogation practices likely to disable an individual from making a free and rational choice about speaking, and held that a suspect must be adequately and effectively advised of the choice the Constitution guarantees[.]" *Id.* at 611 (citations, alterations, and internal quotation marks omitted). "The [relevant] inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*." *Duckworth v. Eagan,* 492 U.S. 195, 203 (1989) (citation, alterations, and internal quotation marks omitted).

In its analysis of the adequacy of the *Miranda* warnings, the Arizona Court of Appeals concluded that "the officers advised Doody of his *Miranda* rights in a clear and understandable manner and that Doody made a knowing and intelligent waiver." *Doody,* 930 P.2d at 449.

However, the record actually reflects that the detective's administering of the *Miranda* warnings was far from "clear and understandable." The Arizona Court of Appeals completely failed to consider the detective's significant deviations from the printed *Miranda* form and his repeated minimizing of the warnings' significance.

During his administration of the warnings, Detective Riley emphasized that Doody should not "take them out of context," and implied to a juvenile, who had never heard of *Miranda,* that the warnings were just formalities. This misdirection was coupled

with repeated assurances that the detectives did not necessarily suspect Doody of any wrongdoing. Most significantly, in informing Doody of the right to counsel, Detective Riley deviated from the form containing the juvenile *Miranda* warnings, and ad libbed that Doody had the right to counsel *if* Doody was involved in a crime. Indeed, Detective Riley instructed Doody that he had the right to counsel "if you were involved in it ... but if you were, then that's what that would apply to[.]" The implication from this improperly qualified, unclear, and confusing warning was that Doody only had the right to counsel if he were involved in a crime. In such a circumstance, the invocation of one's right to counsel would be tantamount to admitting one's involvement in a crime. Overall, the fact that Detective Riley's explanation of a one-page *Miranda* warning form consumed twelve transcribed pages of text is a testament to the confusion generated by the detective's obfuscation. When evaluated against clearly established Supreme Court precedent, the *Miranda* warnings were constitutionally deficient. At a minimum, Doody was never clearly and reasonably informed that he had the right to counsel. *See Miranda,* 384 U.S. at 471-72 ("[A]n individual held for interrogation must be *clearly informed* that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege ... As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation....") (emphasis added).

The *Miranda* warnings provided to Doody were defective because Detective Riley downplayed the warnings' significance, deviated from an accurate reading of the *Miranda* waiver form, and expressly misinformed Doody regarding his right to counsel. In view of clear, convincing and contrary evidence, the Arizona Court of Appeals' conclusion that the *Miranda* warnings were "clear and understandable" constituted both an unreasonable determination of the facts and an unreasonable application of clearly established federal law. *See Seibert,* 542 U.S. at 608.

Our colleagues in dissent chastise us for reaching these conclusions, accusing the majority of "once again pay[ing] mere lip service to AEDPA and then proceed [ing] as though it did not exist." *See Dissenting Opinion,* p. 3032. The dissent would prefer that we simply parrot the findings made during the state court proceedings and call it a day. However, if we succumb to the temptation to abdicate our responsibility on habeas review, we might as well get ourselves a big, fat rubber stamp, pucker up, and kiss The Great Writ good-bye.

As Justice Frankfurter recognized over sixty years ago:

> A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding

> to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. We would have to shut our minds to the plain significance of what here transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right . . .

Watts v. Indiana, 338 U.S. 49, 53-54 (1949).

The dissent strains mightily to salvage the *Miranda* warnings given in this case. Yet the inquiry is a simple one: "whether the warnings reasonably conveyed to a suspect his rights as required by *Miranda*." *Eagan*, 492 U.S. at 203 (citation, alterations and internal quotation marks omitted). The Arizona Court of Appeals went even further, holding that the warnings "were conveyed in a clear and understandable manner." *Doody*, 930 P.2d at 449. The dissent implicitly acknowledges the error in the Arizona Court of Appeals' holding when it concedes that the warnings given were susceptible to multiple interpretations. *See Dissenting Opinion*, pp. 3039-40 (offering at least three plausible interpretations of the officer's explanation of the right to counsel). It defies reason to conclude that a matter is both clear and ambiguous. Indeed, at oral argument, even counsel for the State of Arizona was hard pressed to explain what the officer's

explanation meant.

Our colleagues in dissent cite *Eagan* and *California v. Prysock*, 453 U.S. 355 (1981), in support of their argument that the Arizona Court of Appeals reasonably applied *Miranda*. *See Dissenting Opinion*, pp. 3035-36. Yet, as the dissent admits, *Eagan* addressed "materially different facts from the ones before us ..." *Id.* at 3040. *Eagan* did not involve a juvenile defendant. The officers did not deviate from the printed form with inaccurate and garbled elaborations. There was no downplaying of the significance of the warnings. Most importantly, there was no implication that the right to counsel was available only if the individual being questioned had committed a crime. *See Eagan*, 492 U.S. at 198-99.

Although the dissent is not as candid in its discussion of *Prysock*, that case is similarly inapposite. In *Prysock*, unlike in this case, the juvenile's parents were present. *See Prysock*, 453 U.S. at 356. As in *Eagan*, the officer did not deviate from the written *Miranda* warnings with inaccurate and garbled elaborations. As in *Eagan*, there was no downplaying of the significance of the *Miranda* warnings. As in *Eagan*, there was no implication that the right to counsel was available only if the individual being questioned had committed a crime. *See Prysock*, 453 U.S. at 356-57. In sum, the best cases that can be mustered in support of the dissent's argument are readily distinguishable.[3]

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[3] The dissent halfheartedly cites *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir.1992), *overruled by Chavez v. Martinez*, 538 U.S.

The fact remains that the transcript reveals the use of *Miranda* warnings that were the very antithesis of clear. Compounding the lack of clarity was Doody's express statement to the detective that he had never heard of *Miranda* warnings. Rather than ensuring that Doody understood the warnings, the detective plowed ahead, as reflected in the following excerpt from the interrogation transcript:

> Riley: Any questions?
>
> Doody: No.
>
> Riley: Okay. Okie dokie.
>
> Doody: Oh yeah what's this for? (apparently referring to the *Miranda* form)
>
> Riley: Ah, okay I'll, again, I'm gonna go in and, and explain some things to you. Ah, in the next one states that if you cannot afford an attorney, you'd have the right to have one appointed for you ...

Doody Interrogation Transcript, Tape 1, p. 10.

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760 (2003), as a favorable comparative to Detective Riley's downplaying of the *Miranda* warnings. *See Dissenting Opinion*, p. 3039. In *Cooper*, the officer admitted that he wanted the subject to perceive the *Miranda* warnings as a joke. *See Cooper*, 963 F.2d at 1228. However, the facts in *Cooper* are not that different. The only thing missing in this case is an admission from the detective.

Despite Doody's expressed lack of knowledge concerning the *Miranda* warnings and Doody's subsequently conveyed confusion in the question "what's this for?", Detective Riley ignored Doody's query, and moved on to the next item on his printed list.

Detective Riley injected additional confusion into the process by informing Doody that the *Miranda* warnings were for the mutual benefit of Doody and the officers. Not once, not twice, but three times Detective Riley represented to Doody that the warnings were mutually beneficial. *See* Doody Interrogation Transcript, Tape 1, p. 2. "It's only something for, for your benefit and for our benefit, okay," *see also id.* at p. 3 "[A]ll it is, is its [sic] something that's ah for your benefit, as well as four our's [sic], okay," *id.* at p. 4 "it's for your benefit, it's for your protection and for our's [sic] as well okay?" This repeated misstatement of the purpose of *Miranda* warnings carries a drastically different connotation than if the detective had given Doody a straight-forward explanation that the warnings were given for Doody's protection, to preserve valuable constitutional rights.

The dissent's proposition that the warnings could be construed as "reinforc[ing] that Doody was faced with a phase of the adversary system," *see Dissenting Opinion*, pp. 3019-20, is more wishful thinking than fact. The detective's very words belie such a construction. Neither was the detective's foray a minor "deviation" from the printed warnings. Rather, the detective's garbled, rambling, inaccurate,

obfuscatory advisement consumed twelve pages of transcript. Although no magic words are required, *Miranda* warnings must "clearly inform[ ]" the individual of his rights. *Miranda*, 384 U.S. at 471. The dissent's best efforts notwithstanding, the transcript speaks for itself, revealing a patent lack of clarity. The Arizona Court of Appeals' ruling to the contrary unreasonably applied *Miranda's* requirement that the warnings "clearly inform[ ]." *Miranda*, 384 U.S. at 471.

B. Voluntariness of Doody's Confession[4]

In determining the voluntariness of a confession, a court "examines whether a defendant's will was overborne by the circumstances surrounding the giving of a confession." *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (citation and internal quotation marks omitted). "The due process test takes into consideration the totality of all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation." *Id.* (citations and internal quotation marks omitted). It is not sufficient for a court to consider the circumstances in isolation. Instead, "all the

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[4] Our dissenting colleagues dismiss our discussion of the voluntariness of Doody's confession as gratuitous. *See Dissenting Opinion*, p. 3041. To the contrary, voluntariness is a separate and independent ground for reversal of the Arizona Court of Appeals' ruling, although the voluntariness argument also provides additional support for our findings with respect to the inadequacy of the *Miranda* warnings Doody received. *See Withrow v. Williams*, 507 U.S. 680, 693-94 (1993) (discussing the interrelatedness of the voluntariness and *Miranda* inquiries).

circumstances attendant upon the confession must be taken into account." *Reck v. Pate*, 367 U.S. 433, 440 (1961) (citations omitted).

As the Supreme Court has observed, "[t]he application of these principles involves *close scrutiny* of the facts of individual cases." *Gallegos v. Colorado*, 370 U.S. 49, 52 (1962) (emphasis added). "The length of the questioning, the use of fear to break a suspect, [and] the youth of the accused are illustrative of the circumstances on which cases of this kind turn." *Id.* (citations omitted). An additional relevant factor is "the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation." *Withrow*, 507 U.S. at 693-94 (citations omitted). Thus, we ask: "Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973) (citation omitted).

The fact that Doody was a juvenile is of critical importance in determining the voluntariness of his confession. The Supreme Court "has emphasized that admissions and confessions of juveniles require special caution." *In re Gault*, 387 U.S. 1, 45 (1967). In *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948), the Supreme Court observed:

What transpired would make us pause for

> careful inquiry if a mature man were involved. And when, as here, a mere child-an easy victim of the law-is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest.

Although *Haley* involved a fifteen-year old juvenile, the principles underlying the Supreme Court's observation apply equally to Doody's circumstances given the intensity of his interrogation and his isolation during twelve-plus sleep-deprived hours of continuous questioning. *See Gilbert v. Merchant*, 488 F.3d 780, 791 (7th Cir.2007) ("[A]s the Supreme Court explained in *Gallegos v. Colorado*, a teenager may not on his own be able to fully appreciate what is at stake when the police seek to question him[.]").

The audiotapes of Doody's interrogation are dispositive in this case, as we are not consigned to an evaluation of a cold record, or limited to reliance on the detectives' testimony. We can readily discern

from the audiotapes an extraordinarily lengthy interrogation of a sleep-deprived and unresponsive juvenile under relentless questioning for nearly thirteen hours by a tag team of detectives, without the presence of an attorney, and without the protections of proper *Miranda* warnings. The intensive and lengthy questioning was compounded by Doody's lack of prior involvement in the criminal justice system, his lack of familiarity with the concept of *Miranda* warnings, and the staging of his questioning in a straight-back chair, without even a table to lean on. None of these considerations were even mentioned by the Arizona Court of Appeals.

The dissent denigrates the majority for, in its view, "attempt[ing] to paint Doody as a tender youth, lacking intellect or sophistication, younger than his chronological age of seventeen and one-half years." *Dissenting Opinion*, p. 3042. However, it is not the majority that has set the standard for considering the juvenile status of a subject. The Supreme Court has consistently reminded us that "admissions and confessions of juveniles require special caution." *In re Gault*, 387 U.S. at 45; *see also Haley*, 332 U.S. at 599-600; *Gallegos*, 370 U.S. at 53 (noting that a teenager may not be fully appreciative of the high stakes involved when "questioned through the dead of night by relays of police"). More importantly, the facts, as supported by the record in this case, reveal that Doody was indeed an unsophisticated teenager.

As recently as 2005, the Supreme Court reminded us of the special concern with which we should approach issues involving "juveniles under 18." The

Supreme Court declared that "as any parent knows and as the scientific and sociological studies ... tend to confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citations, alteration, and internal quotation marks omitted). "In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." *Id.* (citation omitted).

Apparently, the State of Arizona holds a similar view of the inability of juveniles to fully appreciate the magnitude of various life experiences. *See Porter v. Triad of Ariz.*, 52 P.3d 799, 802 (Ariz. Ct. App. 2002) ("[I]n Arizona, a minor is never allowed to bring an action in his own name but must always sue through a representative whatever the cause of action.") (citation omitted); *First Nat'l Bank of Ariz. v. Taylor*, 426 P.2d 663, 666 (Ariz. Ct. App. 1967) ("[M]inor beneficiaries cannot consent to the termination of a trust for their benefit.") (citations omitted); A.R.S. § 4-101(18) (establishing the "legal drinking age" as "twenty-one years of age or older"); A.R.S. § 28-3320(A)(5) (providing for suspension of driver's license of individual "under eighteen years of age" for possessing or purchasing materials "used for graffiti"); A.R.S. § 5-504(B)(5) (prohibiting individuals under eighteen years of age from selling lottery tickets); A.R.S. § 5-515.02 (prohibiting

individuals under twenty-one years of age from purchasing lottery tickets); A.R.S. § 5-601.02(w)(1) (prohibiting persons under twenty-one years of age from gambling); A.R.S. § 8-101(4) (defining "child" as "any person under eighteen years of age"); A.R.S. § 9-500.26 (regulating entry from Arizona into Mexico "by any resident ... who is under eighteen years of age"); A.R.S. § 13-3111 (prohibiting minors under eighteen years of age from possessing firearms); A.R.S. § 13-3403(A)(2) (prohibiting sale or transfer of "a vapor-release substance containing a toxic substance to a person under eighteen years of age."); A.R.S. § 13-3403.01(A) (prohibiting the sale or delivery of a container containing nitrous oxide "to a person under eighteen years of age"); A.R.S. § 13-3513 (prohibiting sale or distribution in vending machines of materials harmful to individuals under the age of eighteen); A.R.S. § 13-3721(A)(1) (prohibiting tattooing or body piercing "of a person who is under eighteen years of age without the physical presence of the parent or legal guardian ..."); A.R.S. § 15-805(B)(1) (requiring presence of parent or person having custody when a citation for not attending school "is issued to a child under eighteen years of age"); A.R.S. § 17-362(A) (prohibiting any person "under eighteen years of age" from serving as a licensed guide); A.R.S. § 23-231 (prohibiting persons under the age of eighteen from being employed in certain occupations unless a variance is obtained); A.R.S. § 25-102(A) (providing that "[p]ersons under eighteen years of age shall not marry without the consent of the parent or guardian having custody of such person"); A.R.S. § 28-1555(A) ("A court shall not dispose of a moving traffic

violation charge arising from the issuance of a traffic citation to a juvenile under eighteen years of age unless a parent or guardian of the juvenile appears in court with the juvenile at the time of the disposition of the charge."); A.R.S. § 32-558 (requiring private schools to enter into a contract with students, and providing that "[a] contract between a school and a student shall bear the signature of a school official and the student or parent or guardian if the student is under eighteen years of age"); A.R.S. 36-798.01 (limiting access of persons under eighteen to tobacco products); A.R.S. § 44-1602(H) ("A dealer shall not purchase any precious item from any person under eighteen years of age unless the person is accompanied by a parent or guardian who must submit identification ..."); A.R.S. § 11-251(40) (permitting board of supervisors to impose curfew on minors); A.R.S. § 28-3151, Op. Atty. Gen. No. 67-25-L (providing that a chauffeur's license cannot be issued to a person under eighteen years of age); A.R.S. § 36-333.03(A) (requiring parent or legal guardian of a person under eighteen years of age to petition court to establish minor's date of birth, place of birth, and parentage); A.R.S. § 36-673(D) ("A minor child[under eighteen years of age] shall not be immunized without the informed consent of the parent, guardian or person in loco parentis of the child ...").

In sum, under the law, and as a matter of fact and common knowledge, Doody's participation in ROTC, his not-yet-completed high school studies, his work as a grocery store bagger, his ability to speak English as a second language and his lack of mental

disability in no way lessen the Supreme Court's instruction regarding the special caution with which we review a confession extracted from a teenager.

The dissent makes the same mistake the Arizona Court of Appeals made-ticking off the list of circumstances rather than actually considering them in their totality. Lest the dissent remain "confounded" by this unremarkable conclusion, *Dissenting Opinion,* p. 3054, we liken the Court of Appeals' superficial approach to the listing of a number of mental conditions without explaining how and the extent to which those conditions affect an individual's ability to reason. *See, e.g., Earp v. Ornoski,* 431 F.3d 1158, 1178 (9th Cir.2005), *as amended* (noting the expert's conclusion of the nature of the mental impairment *and* how that impairment affected the individual). The Court of Appeals' approach is also similar to the state court analysis we criticized in *Barker v. Fleming,* 423 F.3d 1085 (9th Cir.2005), where we noted the "crucial" requirement from the Supreme Court of a cumulative assessment when determining the materiality of *Brady* evidence. *Id.* at 1094. We observed that "the Washington Supreme Court did not conduct [a cumulative] analysis. Instead, the court separately analyzed the ... evidence ... on a piece-meal basis and then ended its analysis." *Id.* Likewise, the Arizona Court of Appeals listed the circumstances of Doody's interrogation separately "on a piece-meal basis and then ended its analysis." *Id.*

Most disturbing is the dissent's reliance on the

Arizona Court of Appeals' justification that "the officers offered Doody food and drinks and accommodated his requests to use the restroom." *Dissenting Opinion,* p. 3045. Never mind that the first break was over nine hours into the interrogation, after Doody's will was overborne. That fact was not discussed at all by the Arizona Court of Appeals. The court also completely ignored the fact that Doody was not a native of this country, other than to note that his English was "lightly accented." *See Doody,* 930 P.2d at 445. The court never even mentioned the number of officers involved in the interrogation, the tag team approach used, or the false confessions that the same police task force had extracted previously from the Tuscon suspects.[5] Doody's statements were simply not voluntary given the totality of the circumstances. For the most part, Doody was virtually non-responsive despite being peppered with a barrage of questions, exhortations and commands. This pattern recurred throughout the interrogation.

The Arizona Court of Appeals' ruling was also

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[5] The dissent concedes that "the state court did not describe the physical surroundings" of the interrogation. *Dissenting Opinion,* p. 3045 n.8. In an effort to fill this void, the dissent describes the physical surroundings as "what had been the office of a Maricopa County attorney, roughly ten feet by eighteen feet in size, well-lit, with carpeted floors and padded chairs ..." *Id.* The dissent completely fails to mention that the chair where Doody was seated had a straight, immobile back. There was no table or desk on which Doody could lean or rest his head. For almost thirteen hours, Doody was required to sit completely upright while being interrogated by a tag team of officers.

premised on an unreasonable determination of several pivotal facts. For example, the Arizona Court of Appeals held that "[e]ach of the officers involved in the interrogation testified at the suppression hearing that Doody remained alert and responsive throughout the interrogation and did not appear overtired or distraught. Our review of the audio tapes confirms the officers' testimony." *Id.* at 446. The court of appeals also determined that "[t]he record, both at the time of the suppression hearing and after trial, includes *no evidence* that calls into question the testimony that Doody remained alert and responsive." *Id.* (emphasis added). However, a careful review of the audiotapes reveals a completely different scenario. During the relentless questioning by the detectives, Doody was anything but "responsive." In fact, the detectives utilized relentless interrogation tactics precisely because Doody remained unresponsive and did not provide the answers they sought. At approximately 3:00 a.m., the three officers bombarded Doody with questions in the face of almost complete silence from Doody. They asked him five times who devised the plan to go to the temple. Doody did not answer. They inquired fourteen times whether Caratachea came up with the idea. Doody responded only once-that he did not know. They asked twenty-five times whether Doody was present at the temple. Doody was silent. During this sequence, lasting approximately twenty minutes, Doody answered one out of forty-five questions. That is a far cry from responsive. Indeed, at one point Doody was admonished to "stop freezing up."

The next series of questions addressed whether Doody's failure to respond was due to threats from someone. As an initial matter, we note that this line of questioning completely undermines the detectives' testimony and the Court of Appeals' conclusion that Doody was responsive. If Doody were indeed responsive, there would be no need to question him regarding why he was not responding. Doody responded to a few of these questions, but again fell silent when the detectives inquired seven times about whose idea it was to go to the temple. Doody remained silent for eight minutes in the face of thirty questions in a row. Doody only broke his silence when Detective Sinsabaugh asked him nine times whether he remembered the detective's name. Doody's answers to these questions from Detective Sinsabaugh were barely audible.

The suppression hearing testimony confirms that Doody was not "alert and responsive." Although Detective Riley testified that Doody was alert, this was not the full extent of his suppression hearing testimony. Detective Riley confirmed that there were extended periods during the interrogation when Doody remained unresponsive, when Doody's posture "deteriorated," and when Doody looked down at the ground for long periods of time. Detective Riley also acknowledged that there were several pages of transcript reflecting that Doody did not respond to his continuous questioning.

In view of the fact that we are considering the questioning of a sleep-deprived juvenile subjected to nearly thirteen hours of uninterrupted interrogation,

the degree of Doody's responsiveness is a pivotal concern. The audiotapes reveal that the Arizona Court of Appeals' factual determination that there was no evidence indicating Doody's non-responsiveness was "rebutted by clear and convincing evidence." *Gonzalez,* 341 F.3d at 903 (citations omitted); *see also Wiggins v. Smith,* 539 U.S. 510, 528 (2003) ("This partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court's decision."). Indeed, the Arizona Court of Appeals acknowledged that "Doody did not speak for long periods during the interrogation." *Doody,* 930 P.2d at 447. This acknowledgment directly contravenes the conclusion that Doody was responsive.

The dissent concedes, as it must, that "Doody *did not speak for long periods during the interrogation.*" *Dissenting Opinion,* p. 3051 (quoting *Doody,* 930 P.2d at 447). Yet, in a heroic effort to salvage the unreasonable factual finding that Doody was nevertheless alert and responsive, the dissent relies on "visual clues" to contradict the tale of the silent audiotapes. The dissent's leap in logic completely fails to account for the officers' continuous badgering of Doody for his failure to respond. If he were in fact responding, why would the detectives repeatedly question him regarding his lack of response and urge him to reply? More importantly, the dissent completely ignores Detective Riley's testimony describing the "visual clues" of how Doody's "posture began to deteriorate. His attentiveness also deteriorated. And his eye contact dropped to where he would look at the ground for long periods of time

..." Even assuming that there was equivocal evidence of responsiveness, the Arizona Court of Appeals' finding that *no evidence* supported Doody's claim was unreasonable.

The Arizona Court of Appeals also concluded that "the audio tapes reveal a courteous, almost pleading style of questioning during most of the interview." *Doody,* 930 P.2d at 446. To the contrary, the audiotapes demonstrate that the detectives' relentless and uninterrupted interrogation of an unresponsive juvenile was far from "courteous." Instead, the detectives continuously demanded, over and over without a response from Doody, answers to their questions. The detectives' unyielding demands for answers clearly rebut the Arizona Court of Appeals' determination regarding the interrogation's tone and convince us that Doody's confession was not "the product of an essentially free and unconstrained choice." *See Schneckloth,* 412 U.S. at 225-26. Although the detectives sometimes couched their questions in "pleading" language, their tones were far from pleasant, varying from "pleading" to scolding to sarcastic to demeaning to demanding. Regardless of tone, over twelve hours of insistent questioning of a juvenile by tag teams of two, three and four detectives became menacing and coercive rather than "courteous." Tellingly, some of the detectives' statements, particularly those immediately preceding the confession, informed Doody that he *had* to answer their questions. Any doubt regarding this matter is easily resolved by listening to the audiotapes. At times, the tones of the detectives are downright chilling.

Let us not forget that this same task force questioned four adult men and, undoubtedly using the same tactics, procured what the State concedes were false confessions from all four. That the will of four adult men was overborne to the extent that they confessed to murders they did not commit further persuades us that the will of this young teen was similarly overborne. And that is the real elephant in the room, an elephant that both the Arizona Court of Appeals and the dissent studiously ignore-the undisputed evidence in the record that this same task force, undoubtedly using the same "courteous, almost pleading style of questioning" extracted false confessions from four adults for the same crime with which Doody was charged. Is there any doubt that the wills of those individuals were overborne?[6]

The existence of the false confessions, careful analysis of the interrogation tapes and due consideration of the totality of the circumstances foreclose an intellectually honest conclusion that the finding of voluntariness was reasonable.

The portions of the interrogation tapes quoted above may appear lengthy. However, they are literally just snippets of the entire interrogation, which consumed seventeen tapes. These quotes are excerpts from only two of the tapes, and they are included as a sketch of the actual interrogation. They

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[6] Although our dissenting colleagues attempt to minimize the import of the false confessions, *see Dissenting Opinion*, p. 3053 n.12, they cannot deny their existence.

reveal a picture that bears no resemblance to the avuncular scene painted by the Arizona Court of Appeals. The Arizona Court of Appeals unreasonably minimized the length of Doody's interrogation, an important factor in the voluntariness analysis. *See Gallegos,* 370 U.S. at 52. The Arizona Court of Appeals determined that Doody confessed voluntarily because, "[a]lthough the entire interrogation lasted approximately thirteen hours, Doody admitted he had borrowed Caratachea's rifle at the time of the temple murders after approximately two and one-half hours of questioning." *Doody,* 930 P.2d at 446. Not so. While admitting that he and Garcia borrowed the rifle, Doody identified the time frame as "close to the end of June," more than a month before the murders. Doody Interrogation Transcript, Tape # 3, p. 30. Therefore, contrary to the finding of the Arizona Court of Appeals, Doody decidedly did *not* admit to involvement in the temple murders after two and one-half hours of questioning. Indeed, as reflected in the audiotapes, Doody's admission to *any* involvement occurred only after six-plus hours of intense interrogation by the detectives. The conclusion that Doody's admission occurred after two and one-half hours of questioning finds no support in the record.

Our colleagues in dissent similarly reason that, "although the interview lasted nearly thirteen hours, Doody admitted to borrowing the murder weapon after about two and one-half hours ..." *Dissenting Opinion,* p. 3042. The dissent later clarifies that the Arizona Court of Appeals' finding that "Doody

admitted he had borrowed Caratachea's rifle *at the time of the temple murders* " was a reasonable factual finding. *Dissenting Opinion*, p. 3054 (citing *Doody*, 930 P.2d at 446) (emphasis added). In fact, Doody admitted to borrowing the rifle more than thirty days before the murder. A finding that Doody admitted possessing the murder weapon *at the time of the crime* is patently unreasonable when the admission actually addressed a time period substantially in advance of the date of the crime. The dissent accuses the majority of being "disingenuous" and "re-writ[ing] the state court's findings in order to declare them patently unreasonable." *Dissenting Opinion*, p.3054. However, there is no need to re-write the state court's finding on this point. No amount of sugarcoating can obscure the fact that the state court unreasonably found that Doody admitted possessing the murder weapon at the time of the murders when he made no such admission.

There is also no record support for the Court of Appeals' trivializing of the hours of interrogation after Doody's admission that he was involved in the events at the temple. The audiotapes reveal that the detectives continued to use the same interrogation techniques after Doody's one-word admission. The detectives continued to pressure Doody for details concerning the events at the temple. By the end of the interrogation, Doody was sobbing almost hysterically.

The prosecution used the details of his confession against Doody during trial to corroborate testimony from the prosecution's key witnesses. The hours of

interrogation subsequent to Doody's confession to being present at the temple, therefore, were of critical importance to the case against Doody. The Arizona Court of Appeals' contrary determination was objectively unreasonable. *See Taylor v. Maddox*, 366 F.3d 992, 1008 (9th Cir.2004) ("[F]ailure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness of the finding.") (citation omitted).

Finally, the Arizona Court of Appeals' voluntariness ruling unreasonably applied clearly established federal law because it analyzed the individual circumstances of the interrogation without weighing the totality of the circumstances. As discussed above, the Arizona Court of Appeals failed to consider "whether [Doody's] will was overborne by the circumstances surrounding the giving of a confession." *Dickerson*, 530 U.S. at 434 (citation and internal quotation marks omitted). "The determination depends upon a *weighing* of the circumstances of pressure against the power of resistance of the person confessing." *Id.* (citation, alteration, and internal quotation marks omitted) (emphasis added).

Rather than weighing all the circumstances, the Arizona Court of Appeals dismissed each relevant fact seriatim without considering whether Doody's juvenile will was overborne by the relentless questioning of a tag team of detectives over the course of an interrogation that lasted, virtually without interruption and despite Doody's non-

responsiveness, from approximately 9:30 p.m. until 10:00 a.m. As noted above, the Arizona Court of Appeals failed to consider in totality circumstances including Doody's youth, his lack of prior involvement with the criminal justice system, his lack of familiarity with *Miranda* warnings, his non-native status, the length of the interrogation with Doody seated in a straight-back chair for over nine hours without a break, the lack of adequate *Miranda* warnings, the tag team tactics used by the detectives, the number of interrogators, Doody's persistent non-responsiveness, and the previous false confessions. We recognize that the Arizona Court of Appeals determined that the *Miranda* warnings were "clear and understandable," *Doody*, 930 P.2d at 449, thereby explaining its failure to weigh that particular aspect of the interrogation. However, no apparent justification can be discerned for the failure to actually weigh, rather than simply list, the other factors that have been delineated for consideration by the United States Supreme Court. This failure of the Arizona Court of Appeals was an unreasonable application of established authority requiring consideration of the total circumstances surrounding the interrogation, and it renders the conclusion of voluntariness infirm. *See Reck*, 367 U.S. at 440-42 (addressing the "combination of circumstances"); *see also Gallegos*, 370 U.S. at 52 (condemning interrogators "serving in relays").

In determining the voluntariness of a confession, "[t]he due process test takes into consideration the totality of all the surrounding circumstances-both the characteristics of the accused and the details of

the interrogation.... The determination depends upon a *weighing* of the circumstances of pressure against the power of resistance of the person confessing." *Dickerson,* 530 U.S. at 434 (citations, alterations, and internal quotation marks omitted) (emphasis added). The required weighing of the circumstances was not performed by the state court.

The dissent's argument notwithstanding, the jury's voluntariness determination is not dispositive. In *Jackson v. Denno,* 378 U.S. 368, 390 (1964), the Supreme Court explained:

> Expanded concepts of fairness in obtaining confessions have been accompanied by a correspondingly greater complexity in determining whether an accused's will has been overborne-facts are frequently disputed, questions of credibility are often crucial, and inferences to be drawn from established facts are often determinative. The overall determination of the voluntariness of a confession has thus become an exceedingly sensitive task, one that requires facing the issue squarely, in illuminating isolation and unbeclouded by other issues and the effect of extraneous but prejudicial evidence.

Id. at 390 (citations omitted). Applying *Jackson,* the Arizona Court of Appeals has emphasized the importance of the trial court's duty to exclude involuntary confessions, irrespective of the jury's finding. *See State v. Strayhand,* 911 P.2d 577, 589 n.3 (Ariz. Ct. App. 1995) ("The dissent says that even

if the confessions should not have been admitted, no fundamental error occurred because the jury found that they were voluntary. The proper procedure for weighing voluntariness is set out in [*Jackson*]. The threshold voluntariness inquiry is for the court and the defendant can reargue the matter to the jury. Considering *Jackson* ... it is clear that *when it appears at any stage of the proceedings that a confession is involuntary, it is the trial judge's duty to exclude it from evidence.*") (emphasis added).

Our dissenting colleagues implicitly condemn Doody for not testifying at the voluntariness hearing. *See Dissenting Opinion,* pp. 3030. However, as the Arizona state courts have held, Doody's failure to testify does not preclude relief. *See id.* ("The fact that the Defendant did not testify at the voluntariness hearing does not mean that he is not entitled to relief now....").

Relying on *Juan H. v. Allen,* 408 F.3d 1262 (9th Cir.2005), and *United States v. Doe,* 155 F.3d 1070 (9th Cir.1998) (en banc), the dissent also maintains that this court has "repeatedly held a suspect's minor age and the absence of a parent do not make a confession presumptively involuntary." *Dissenting Opinion,* p. 3046. Besides the fact that the majority opinion never applies any presumption of involuntariness, these cases are readily distinguishable. In *Juan H.,* the defendant was properly informed of his *Miranda* rights, and never made any incriminating statements. *See Juan H.,* 408 F.3d at 1272-73. Accordingly, no credible claim of involuntariness could be made. *See id.*

Doe is similarly inapposite. In that case, we noted that "there [was] no indication that the questioning was oppressive in any way." *Doe,* 155 F.3d at 1075. Such was not the case with Doody. Indeed, the dissent concedes that the police "engag[ed] in a variety of psychologically coercive interrogating tactics." *Dissenting Opinion,* p. 3048.

The amalgamated citations to *Clark v. Murphy,* 331 F.3d 1062 (9th Cir.2003), *Jenner v. Smith,* 982 F.2d 329 (8th Cir.1993), *United States v. Lehman,* 468 F.2d 93 (7th Cir.1972), and *United States v. Haswood,* 350 F.3d 1024 (9th Cir.2003), *See Dissenting Opinion,* pp. 3046, are no more persuasive, as none of these cases involved a juvenile, or lengthy middle-of-the-night questioning. *See Clark,* 331 F.3d at 1072 (questioning of an adult for five hours); *Jenner,* 982 F.2d at 333-34 (questioning of an adult for seven hours); *Haswood,* 350 F.3d at 1027-28 (questioning of an adult for an undetermined amount of time that was inferred to be "all day").

It is unclear why the dissent cites to *Lehman.* In that case, a dentist was questioned in his office, and the Seventh Circuit observed:

> Although Lehman maintains that he felt confined and watched in his own small private office and that his will was eventually overcome by the agents' method of questioning, he found time during this period of alleged virtual confinement to discuss his

> academic achievements and to recommend to one of the agents what should be done for the treatment of emphysema. Lehman was in his own suite and not in custody and could have cut off the interview at any time. He was found to be a man of intelligence, education and maturity. He was apprised of his questioners' mission with regard to a determination of the correctness of his tax returns, and he was not completely unschooled in the implications of a tax investigation.
>
> *We further note that on at least two occasions the agents asked Lehman if he wanted to leave for his golf date.*

Lehman, 468 F.2d at 101 (emphasis added). This case in no way resembles the circumstances of Doody's interrogation.

The dissent also relies on cases where the Supreme Court has addressed more extreme facts involving adults. *See Dissenting Opinion,* pp. 3050-51; *see also, Greenwald v. Wisconsin,* 390 U.S. 519, 520-21 (1968) (interrogation of a defendant suffering from high blood pressure and deprived of sleep, food, and medication); *Darwin v. Connecticut,* 391 U.S. 346, 349 (1968) (forty-eight hour interrogation of a defendant who had been denied his right to counsel); *Beecher v. Texas,* 389 U.S. 35, 38 (1967) (interrogation of a wounded defendant at gunpoint over five days); *Clewis v. Texas,* 386 U.S. 707, 709-10 (1967) (nine-day interrogation with inadequate food and sleep); and *Davis v. North Carolina,* 384 U.S.

737, 746-47 (1966) (questioning over a sixteen-day period with inadequate food). However, the Supreme Court has never held, let alone suggested, that the interrogation of a juvenile must meet some standard of extremity to render a confession involuntary. Rather, the Supreme Court has directed that we proceed with the utmost caution when considering the confession of a juvenile, being ever mindful of the "tender age" of the individual involved. *In re Gault,* 387 U.S. at 45.

The dissent seeks to minimize the impact of the Supreme Court's holding in *Haley,* describing this seminal case as "readily distinguishable." *Dissenting Opinion,* p. 3047.

In *Haley,* the Supreme Court set forth the following background:

> Beginning shortly after midnight this 15-year old lad was questioned by the police for about five hours. Five or six of the police questioned him in relays of one or two each. During this time no friend or counsel of the boy was present. Around 5 a.m. after being shown alleged confessions of Lowder and Parks the boy confessed ...

332 U.S. at 598. Despite the absence of extreme facts, the Supreme Court concluded:

> The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him,

> the callous attitude of the police towards his rights *combine* to convince us that this was a confession wrung from a child by means which the law should not sanction ...

Id. at 600-01 (emphasis added).

The dissent does not even mention the operative facts regarding the actual interrogation in *Haley*:

> What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child-an easy victim of the law-is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him. No friend stood at the side of this 15-year old boy as the police, working in relays,

> questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called duri[illegible] the critical hours of questioning. A photo[illegible]rapher was admitted once this lad broke a[illegible]d confessed. But not even a gesture towards getting a lawyer for him was ever made.

Haley, 332 U.S. at 599-600. The dissent skips over these facts in favor of several facts in *Haley* that occurred *after* the interrogation. *See Dissenting Opinion,* p. 3047. In the paragraph immediately following the Supreme Court's description of the interrogation, the Supreme Court observed:

> This disregard of the standards of decency is underlined by the fact that he was kept incommunicado for over three days during which the lawyer retained to represent him twice tried to see him and twice was refused admission. A photographer was admitted at once; but his closest friend-his mother-was not allowed to see him for over five days after his arrest. It is said that these events are not germane to the present problem because they happened *after* the confession was made. But they show such a callous attitude of the police towards the safeguards which respect for ordinary standards of human relationships compels that we take with a grain of salt their present apologia that the five-hour grilling of

> this boy was conducted in a fair and dispassionate manner. When the police are so unmindful of these basic standards of conduct in their public dealings, their secret treatment of a 15-year old boy behind closed doors in the dead of night becomes darkly suspicious.

Haley, 332 U.S. at 600 (emphasis added). In the next paragraph, the Supreme Court applied the relevant totality of the circumstances standard:

> The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights *combine* to convince us that this was a confession wrung from a child by means which the law should not sanction. Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.

Id. at 600-01 (emphasis added). *Haley,* therefore, is not "readily distinguishable." *Dissenting Opinion,* p. 3047. Indeed, the facts of *Haley* are much more analogous to the circumstances faced by Doody than are the cases cited by the dissent in support of its argument.

The dissent cites to *United States ex rel. Hayward v. Johnson,* 508 F.2d 322 (3d Cir.1975), *Rogers v. Quarterman,* 555 F.3d 483 (5th Cir.2009), *Jackson v. McKee,* 525 F.3d 430 (6th Cir.2008), and *Hardaway v. Young,* 302 F.3d 757 (7th Cir.2002), for

the proposition that other circuits have readily distinguished *Haley*. *See Dissenting Opinion*, p. 3047-48 n.10. A close examination of these cases reflects why they distinguished *Haley*, and in no way support the Arizona Court of Appeals' ruling.

In *Hayward*, the seventeen-year old defendant "was questioned on three separate occasions ... each time in a small interrogation room at the police station and each time after receiving the full Miranda warnings.... [H]e went voluntarily and with his mother's permission each time he was questioned." 508 F.2d at 324. The Third Circuit observed:

> [W]e are troubled by the police conduct here, involving a late night questioning, without any apparent justification, of a seventeen-year old youth. We also acknowledge that the Supreme Court's decision in [*Haley*], on which appellant relies, is in some respects similar to the case before us. In that case, the Supreme Court held involuntary the confession of a fifteen-year old boy who was taken from his home at night and questioned steadily from 12:00 midnight to 5:00 a.m.

Id. at 326.

However, the Third Circuit relied on the fact that the appellant never challenged the adequacy of the *Miranda* warnings to distinguish *Hayward* from *Haley*. *See id.* at 327. The Third Circuit also noted that:

the period of questioning was shorter and the manner of questioning seems less coercive. Unlike the youth in [*Haley*], who gave his confession only after five hours of continuous incommunicado questioning by five or six policemen in relays of one or two each, *appellant here began to give his confession early on the third occasion he was questioned, and the questioning was conducted predominantly by one person, Detective Kelly.*

Furthermore, *the confession was obtained only on the third occasion he was questioned. By October 3, the circumstances of his questioning and the setting at the police station must have appeared less novel and intimidating; after two previous questionings he had been sent home, where he had the opportunity, unpressured by the police, to consider his situation; he was fully informed that the police were investigating his possible role in the death of William Smith; and he was surely aware that the police had twice released him without obtaining a confession.* Therefore, since he had been subjected to unfamiliar surroundings on two prior occasions and yet had withstood lengthy questionings without confessing, we find it difficult to conclude that he was not acting voluntarily on October 3, when he began giving his oral incriminatory statement shortly after arriving and completed giving it within *an hour and fifteen minutes of*

> *questioning.* Finally, *unlike the Supreme Court in Haley, we, find no evidence of a callous disregard of appellant's rights by the police after he gave his confession which might cast suspicion on their conduct throughout the questioning.*

Id. at 327 (citation and footnote references omitted) (emphases added). Contrary to the dissent's assertion, the Third Circuit did not distinguish *Haley* simply because the "suspect was informed of his right to remain silent." *Dissenting Opinion*, p. 3047-48 n.10 (internal quotation marks omitted).

In *Rogers*, 555 F.3d at 485, after being informed of his rights by a magistrate, the defendant

> was then taken to an interview room and left alone for a short amount of time. He was offered a soda. He was then interrogated by the officers for *three to five minutes.* During this time, Rogers claimed he was innocent. Anderson became frustrated and told Rogers to stop lying because his prints had been found at the crime scene. Rogers began to tear up, so he was asked if he would like to speak with a particular officer about the offense. Rogers chose Douglas, so Miller and Anderson left the room. *After 30-35 minutes, Douglas exited the interview room and stated that Rogers had confessed.*

Id. at 485 (emphasis added). In distinguishing *Haley*, the Fifth Circuit opined:

> *Rogers was not continuously or lengthily interrogated* ... Most significantly, *he was not subjected to physical abuse, mental coercion, trickery, or deceit* ... The officers were truthful when they represented to Rogers that his fingerprints had been found at the scene, and *there is no evidence that the officers somehow induced Rogers's confession.* Moreover, *Rogers was afforded the full, extensive protections of section 51.09 of the Texas Family Code.*[7]

Id. at 495 (emphases added). The safeguards present in *Rogers* were not available in *Haley* or to Doody.

In *Jackson*, the seventeen-year old defendant was interrogated on several occasions. The Sixth Circuit distinguished *Haley*:

> *Jackson, by contrast* [to *Haley*], *was older (17 years old); he was questioned intermittently, not continuously; he was told repeatedly of his rights to counsel and to remain silent; and no*

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[7] Texas Family Code § 51.06 provides:

> Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if: (1) the waiver is made by the child and the attorney for the child; (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it; (3) the waiver is voluntary; and (4) the waiver is made in writing or in court proceedings that are recorded.

> *evidence shows that the officers took a callous attitude toward his rights ...*

Jackson, 525 F.3d at 435 (citations omitted) (emphasis added). Because the defendant "was questioned intermittently, not continuously," "told repeatedly of his rights to counsel and to remain silent," and "[t]he officers' questioning ... never exceeded two and a half hours at a time," it is not surprising that the Sixth Circuit did not fault the state court for "declining to extend [*Haley*]" to the facts. *Id.* at 434-35. Contrary to the dissent's characterization, the Sixth Circuit, therefore, did not distinguish *Haley* only on the basis that the "suspect, by contrast, was older (17 years old)." *Dissenting Opinion,* p. 3047-48 n.10.

Finally, in *Hardaway,* the Seventh Circuit noted:

> Hardaway's case is less egregious [than Haley's], in that there were no efforts to keep his parents away or to confront him with false testimony, and he was held for less than one day rather than three.[8] *There were also lengthy breaks in the interrogations, rather*

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[8] Although the dissent relies on this statement that the defendant "was held for less than one day rather than three," to distinguish *Haley* from *Doody, see Dissenting Opinion,* p. 3047-48 n.10, it is important to remember that the holding of Haley for three days occurred *after* his interrogation. *See Haley,* 332 U.S. at 600. It is unclear why the dissent implies that three days in custody is somehow a temporal benchmark for whether a confession is involuntary, particularly as the Supreme Court emphasized that Haley was "questioned through the dead of night by relays of police ... from midnight to 5 a.m." *Id.* at 599.

than the five grueling hours that Haley was forced to endure.

Hardaway, 302 F.3d at 763 (citations, alteration, and internal quotation marks omitted). Contrary to the dissent, the Seventh Circuit did not simply distinguish *Haley* because "the suspect was held for less than one day rather than three." *Dissenting Opinion*, p. 3047-48 n.10 (internal quotation marks omitted).

Simply put, the dissent attempts to distinguish *Haley* by relying on several cases from other circuits. *See Dissenting Opinion*, p. 3047-48 n.10. However, those cases in no way support the dissent's assertion that *Haley* is inapposite.

Although AEDPA requires deference to the state courts in their factual findings and legal conclusions, deference does not equate to abdication of our judicial responsibilities. *See Taylor*, 366 F.3d at 1008 ("In passing section 2254(d)(2), Congress has reminded us that we may no more uphold such a factual determination than we may set aside reasonable state-court fact-finding. When we determine that state-court fact-finding is unreasonable, therefore, we have an obligation to set those findings aside and, if necessary, make new findings."). We recognize and acknowledge that police officers are entitled to use, and do use, a variety of techniques to interrogate suspects. However, when those techniques overbear the will of the suspect in contravention of his constitutional rights, any confession obtained through the

overbearance must be suppressed. *See DeWeaver*, 556 F.3d at 1002-03 ("A confession must be suppressed, even absent a *Miranda* violation, when the totality of the circumstances demonstrates that the confession was involuntary.") (citation omitted).

With the utmost respect to our concurring colleague, we do not view our opinion as an exercise in "yarn-spinning." *See Concurring Opinion*, p. 3017. Rather, we address the Arizona Court of Appeals' unreasonable determinations, including that there was "*no evidence* that calls into question the testimony that Doody remained alert and responsive." *Doody*, 930 P.2d at 446 (emphasis added). To uphold this determination, we would have to conclude that Doody's claims were made from whole cloth. The record in this case forecloses such a determination, and highlights the unreasonableness of the state court's finding that *no* such evidence existed.

C. Harmless Error

A coerced confession is generally not admissible evidence. *See id.* However, in this case, Doody's statements confessing his involvement were admitted into evidence and considered by the jury. On habeas review, once we determine, as we discussed above, that the state court's voluntariness determination was an unreasonable application of Supreme Court precedent, we turn to the consideration of whether the error was harmless. "Because the court of appeal[s] found the confession admissible, it did not conduct harmless-error

analysis. We must therefore review the evidence at trial to determine whether the confession likely had a substantial and injurious impact on the verdict; if not, its admission was harmless." *Taylor,* 366 F.3d at 1016 (citations omitted). "[T]he question is whether the erroneously admitted evidence had a substantial and injurious effect or influence in determining the jury's verdict." *Ghent v. Woodford,* 279 F.3d 1121, 1127 (9th Cir.2002), *as amended* (citations and internal quotation marks omitted).

At trial, Doody argued that there was no physical evidence linking him to the temple murders; the investigation was mismanaged; the prosecutor charged three individuals, part of the Tucson Four, who had confessed to the events at the temple; the testimony of the prosecution's key witness, Garcia, was not truthful, because he had a reason to lie given his plea agreement; and that Garcia, Caratachea, and Gonzales committed the temple murders and Doody was either not involved in the temple murders at all, or was present only as a bystander.

To counter Doody's arguments, the prosecution introduced the audiotapes of Doody's statements. The prosecution's reliance on the statements is evidenced by its closing arguments, which were replete with references to the audiotapes.[9] For

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[9] The dissent simultaneously scolds us for reciting the audiotapes at length and for "leav[ing] key sentences, exchanges, and pages of transcript unaccounted for." *Dissenting Opinion,* p. 3054-55. Yet, the dissent does not give one concrete example of omitted information from the audiotapes that would salvage this interrogation. Because the audiotapes highlight the

example, the prosecution argued:

> He admits, and this is tape three, page twenty-eight, and at tape nine, page thirteen, Jonathan Doody admits, "Me and Alex borrowed Rollie's gun." Corroboration now for Rollie Caratachea's statement to us, and also corroboration for Alex Garcia's statements that they, in fact, did borrow that gun from Rollie. He then admits experimenting with the silencer, tape four. But later he says, tape eleven, that it was for use in the temple. The use of the silencer in the temple, very important. It shows premeditation to commit the murders, support for Alex Garcia's statements.... He admits involvement in the temple, tape nine, page eight. He admits that he was involved in the temple crimes. The very next thing he does is he admits that this was with Alex Garcia.

Trial Transcript, July 8, 1993, pp. 36-37.

In rebuttal, the prosecution also referred to Doody's statements to support a felony murder conviction. The prosecution stated:

> Let's do it again. Go inside and let's see what we can get. Tape eleven, pages seventeen to eighteen; tape thirteen, page thirty seven.

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unreasonableness of the state court's findings, it is completely understandable that the dissenters would prefer that these audiotapes not see the light of day.

> Those are Jonathan Doody's comments. This isn't the State.... Mr. Doody is on trial. This is what he said. He told us this. He went back in that temple to see what he could get.... They went in there with force, and that's armed robbery, and that's a conviction of felony murder. Pure and simple.

Id. at 155-56.

The prosecution commented that the case was "easy because of what Jonathan Doody tells us. Alex Garcia corroborates it, gives us a lot of detail. The evidence, gives a lot of corroboration, a lot more detail. But *you don't have to go beyond Jonathan Doody's statement* ..." *Id.* at 156 (emphasis added). Despite the dissent's effort to catalog other evidence against Doody, the record reflects that Doody's statements were the linchpin of the prosecution's case.

As evidenced by the prosecution's arguments, Doody's statements were integral to the prosecution's case, particularly as "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona v. Fulminante,* 499 U.S. 279, 296 (1991) (citations omitted). We cannot conclude that the admission of Doody's confession was harmless error because Doody's statements likely "had a substantial and injurious effect or influence in determining the jury's verdict." *Ghent,* 279 F.3d at 1127.

IV. CONCLUSION

We hold that the Arizona Court of Appeals' decision constituted an unreasonable determination of the facts and an unreasonable application of the governing law to the particular facts of this case. The Arizona Court of Appeals unreasonably concluded that the *Miranda* warnings were clear and understandable, despite the detective's erroneous warnings regarding Doody's right to counsel and the use of qualifying language to downplay the warnings' significance. Thus, we hold that under the standard of review set forth in AEDPA, Doody is entitled to a writ of habeas corpus on the ground that the *Miranda* warnings the police gave him were inadequate and his confession was therefore inadmissible.[10]

Additionally, the Arizona Court of Appeals' ruling that Doody's confession was voluntary was an

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[10] Our dissenting colleague's leadoff reference to the recent Supreme Court decision of *McDaniel v. Brown*, 130 S.Ct. 665 (2010), *see Dissenting Opinion*, p. 3025, is puzzling. *Brown* involved this court's application of *Jackson v. Virginia*, 443 U.S. 307 (1979), in resolving a sufficiency-of-evidence challenge. *See Brown*, 130 S.Ct. at 667 ("We granted certiorari to consider whether [the District Court and Court of Appeals] misapplied *Jackson*."). The discussion of § 2254(d)(1) was made in the context of our described failure to "review the evidence in the light most favorable to the prosecution" as required by *Jackson*. *Id.* at 673 (citation and internal quotation marks omitted). In contrast, this case concerns review of the adequacy of a *Miranda* warning and the voluntariness of a confession, neither of which is governed by the *Jackson* directive to view all evidence in the light most favorable to the prosecution.

unreasonable determination of the facts in light of the audiotapes that reflect the relentless, nearly thirteen-hour interrogation of a sleep-deprived juvenile by a tag team of detectives. The Arizona Court of Appeals also unreasonably applied clearly established federal law when it failed to consider the totality of the circumstances to determine if Doody's will was overborne by the interrogation. Accordingly, we hold that under the standard of review set forth in AEDPA, Doody is entitled to a writ of habeas corpus on the ground that his confession of his involvement in the temple murders was involuntary, and therefore inadmissible.

Accordingly, we **REVERSE** and **REMAND** this case to the district court to grant Doody's habeas petition unless the State of Arizona elects to retry Doody within a reasonable time.

KOZINSKI, Chief Judge, concurring in the result:

Not for the first or last time, we're asked to consider what it means for an opinion of a state court to be "unreasonable" under 28 U.S.C. § 2254(d). I write separately because I believe that deference is neither a blindfold nor a bandana.

The state court may well have been wrong to find Doody's confession voluntary. Doody, a teenager, was isolated from his friends and family and interrogated for over twelve hours. Working in shifts, police kept Doody awake overnight. They employed many of the psychological techniques that troubled the Supreme Court in *Miranda v. Arizona*:

> To be alone with the subject is essential to prevent distraction and to deprive him of any outside support.... He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance.... The police then persuade, trick, or cajole him out of exercising his constitutional rights.

384 U.S. 436, 455, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The police pled with Doody, over and over, to "tell me," "trust me" and "[t]alk to me so I understand." They ordered him: "You have to tell us." They warned him: "There are statements, I'd say damaging statements toward you and its gonna, and its gonna pile up Jon, it's gonna be so deep." They said they knew "you've got some tremendous answers up in that, that head of yours" because they "could just tell it in your eyes," and they lied to him: "I probably won't ask you a question, that I don't already know the answer." They promised him, falsely, that his words were "between us," and that "[w]hat you tell us right now, is gonna stay right here." Doody was silent for long periods of questioning, and he ended the interrogation in tears.

But that's not the only way to read the record. As the state court noted, Doody was nearly eighteen, maintained good grades and "participated in his high school honor guard." *State v. Doody,* 930 P.2d 440, 445 (Ariz. Ct. App. 1996). The officers employed a "courteous, almost pleading style of questioning" and "testified at the suppression hearing that Doody remained alert and responsive throughout the interrogation." *Id.* at 446. The officers also "offered Doody food and drinks and accommodated his requests to use the restroom." *Id.* During his long periods of silence, Doody may have been thinking up a story that would fit the evidence against him but also keep him out of trouble. Indeed, when Doody confessed, he gave a relatively exculpatory account in which he was outside the temple at the time of the killing. He started crying, he said, because the police "came out and ma[d]e it sound like [they] didn't believe" that version of events. That's the statement of a person who had staked his future on a half-truth, as opposed to someone whose will was overborne.

I doubt anyone but Doody will ever know with certainty whether his confession was voluntary, and perhaps not even he. After all, "Difficulties of proof and subtleties of interrogation ... [make] it impossible in most cases for the judiciary to decide with confidence whether [a] defendant ... voluntarily confessed." *New York v. Quarles,* 467 U.S. 649, 683 (1984) (Marshall, J., dissenting). The majority spins a good yarn, but the state court also told a good story. Even federal judges can't read Doody's mind or travel back in time. And, as the Supreme Court has

told us, "The more general the rule, the more leeway courts have in reaching outcomes." *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004). This is precisely the kind of debatable application of a "general standard" where finality and respect for the independent judgment of the state courts counsels the highest deference on federal habeas review. *See Knowles v. Mirzayance,* 129 S. Ct. 1411, 1420 (2009). I would therefore let stand the state court's finding that the confession was voluntary.

But, unlike voluntariness, "a warning is a clearcut fact." *Miranda,* 384 U.S. at 469. Voluntariness asks courts to speculate about intangibles, but *Miranda* seeks "*ascertainable* assurance that the accused was aware" of his rights. *Id.* at 472 (emphasis added). It therefore provides a "clear, easily administered device for ensuring that criminal suspects understand their constitutional rights," *Quarles,* 467 U.S. at 683 (Marshall, J., dissenting), and experience has proved that its bright line rule is manageable "for law enforcement officers to conform to, and for courts to apply in a consistent manner," *Dickerson v. United States,* 530 U.S. 427, 444 (2000). Accordingly, when a state court asks whether a suspect was adequately warned, "[a]pplications of the rule may be plainly correct or incorrect." *Yarborough,* 541 U.S. at 664. We need not defer to plainly incorrect applications.

From tapes of the interrogation, we know exactly what the police said when informing Doody of his right to an attorney:

> [Y]ou have the right to have an attorney present prior to and during questioning, and what that means that if you want one, you're allowed to have a lawyer here before and during you know my questions to you, okay. And then an attorney is a lawyer who will speak for you and help you concerning the crime or any kind of offense that ah we think that you or somebody else is involved in, *if you were involved in it,* okay. Again, it not necessarily mean that you are involved, but *if you were, then that's what that would apply to okay.* (emphasis added)

We can listen as the officer recites the familiar words: "[Y]ou have the right to have an attorney." And we can listen as he provides a generic and inoffensive definition of "attorney": "[A] lawyer who will speak for you and help you." And, finally, we can observe in slow motion as the officer's *Miranda* warnings fly off the rails: "[I]f you were involved in it, okay. Again, it not necessarily mean that you are involved, but if you were, then that's what that would apply to okay." Those words are undisputed facts.

Faced with those facts, the Arizona Court of Appeals found that Doody's rights were read to him "in a clear and understandable manner" and that the "officers read each warning from a standard juvenile form and provided additional explanations as appropriate." *Doody*, 930 P.2d at 449. The officer's statements about the right to counsel weren't quoted in the state court opinion, and the state court never

tried to explain how those words could possibly be "clear," "understandable" or "appropriate." And this wasn't because Doody failed to bring them to the court's attention; his state court brief quoted the officer's language and argued:

> This ambiguous paraphrase suggested that invoking the right to counsel would be tantamount to an admission of guilt. It also suggested Doody did *not* have a right to counsel unless he were involved (or willing to admit involvement), or that the right would arise when he became a suspect. Those suggestions were not just confusing, but wrong.

Brief of Defendant-Appellant Jonathan Andrew Doody at 24, *Doody*, 930 P.2d 440 (No. CR 92-01232). The state court's silence in response to Doody's clear and cogent argument does not reflect the kind of good faith adjudication of federal rights that AEDPA strives to insulate from collateral review.

The dissent tells us that the state court's characterization of the officer's words was not unreasonable because the officer might have meant to "reinforce that Doody was 'faced with a phase of the adversary system.' " Dissent at 3039-40 (quoting *Miranda*, 384 U.S. at 469). I'm not entirely sure what this means, and I certainly don't see anything so benign lurking in the officer's words. Here they are again:

> [A]n attorney is a lawyer who will speak for

> you and help you concerning the crime or any kind of offense that ah we think that you or somebody else is involved in, if you were involved in it, okay. Again, it not necessarily mean that you are involved, but if you were, then that's what that would apply to okay.

The officer did say something about the adversary system: That a lawyer will help you "if you were involved" in criminal activity, and that the right to an attorney only applies to you if "you were involved." This, of course, is not true: The innocent, no less than the guilty, are entitled to a lawyer. Or, in Officer Riley's peculiar argot: "Whether you were involved or not, then that's what that would apply to okay."

The dissent admits that the officer's words "*could* be construed" to say you only get a lawyer if you're guilty. Dissent at 3039. This pretty much gives up the ship, as warnings that "could" be construed in such a manner can't possibly be "clear," "understandable" or "appropriate." It is established beyond doubt that "an individual held for interrogation must be *clearly* informed that he has the right to consult with a lawyer," *Miranda,* 384 U.S. at 471 (emphasis added), and that warnings must "apprise the accused of his right to have an attorney present," *Duckworth v. Eagan,* 492 U.S. 195, 205 (1989). The whole point of *Miranda* is to provide "assurance that the accused was aware" of his rights. 384 U.S. at 472. There's no such assurance when a warning "could" be interpreted to say the polar opposite of what *Miranda* requires.

The warning given in this case was far worse than no warning at all. At least an un-warned suspect may know his rights without being told about them; many non-lawyers watch *Cops* and *Law and Order*. But a non-lawyer who knows about the right to counsel, and who might even be willing to invoke it without a warning, may well hesitate to ask for a lawyer after being told that the right would only apply "if you were involved." After all, a request for a lawyer would be an admission that "you were involved," as only suspects who knowingly fall into that category would have a right to ask for one. Upholding such a warning would contravene the very core of the rule established by *Miranda*: When the Court prescribed words that would make suspects aware of their rights, it certainly did not intend to approve warnings that would throw those rights into doubt and make invocation of the right to counsel even less likely than it is already.

Here's a simple test of the warning's adequacy: Suppose everything the officer said had been printed on a standardized waiver produced by the state. Since this was Arizona, the birthplace of *Miranda,* maybe police felt they were entitled to improve on the Supreme Court's work; call it Miranda 2.0:

> You have the right to an attorney present prior to and during questioning, provided you were involved in the crime. (If you were involved, then that right would apply to you.) Do you understand this right?
>
> Yes_____ No_____

Now suppose Doody had initialed such a form. Would we uphold the warning just because it contained the magic words "You have the right to an attorney"?

This case is no different, although the officer spoke the words instead of printing them on paper. As the state court acknowledged, the officer's statements were made at the same time that Doody read his written warnings and were offered as "explanations" of the rights Doody agreed to waive. *Doody,* 930 P.2d at 449. If Miranda 2.0 doesn't pass muster, neither does the warning in this case.

Even under AEDPA, it's not possible to bend the record far enough to sustain the state court's opinion. The dissent is correct that the Supreme Court has repeatedly overturned this court for insufficient deference. Dissent at 3025-26. But the Court has also said that AEDPA's "standard is demanding but not insatiable" and that " 'deference does not by definition preclude relief.' " *Miller-El v. Dretke,* 545 U.S. 231, 240 (2005) (alteration omitted) (quoting *Miller-El v. Cockrell,* 537 U.S. 322, 340 (2002)). In *Anderson v. Terhune,* we found that AEDPA did not require us to manufacture uncertainty and ambiguity as to whether a suspect invoked his right to silence when he said, "I plead the Fifth." 516 F.3d 781, 787 (9th Cir.2008) (en banc); *see also Hart v. Attorney Gen. of Fla.,* 323 F.3d 884, 894 (11th Cir. 2003). Deference doesn't mean self-deception. We can't ignore the fact that the state court in this case held up the officer's language as a model application of *Miranda* even though his words were misleading

at best and flat wrong at worst.

The dissent offers a number of other arguments for denying relief, even if the warnings weren't "clear," "understandable" or "appropriate." *See* Dissent at 3039-41. Our dissenting colleagues appear to believe that AEDPA deference requires us to indulge every possible justification for the state court opinion, whether or not the argument is consistent with what the state court actually held. But we know that's not the case. *See Rompilla v. Beard,* 545 U.S. 374, 390 (2005); *Frantz v. Hazey,* 533 F.3d 724, 733-35, 738 (9th Cir. 2008) (en banc). What deference requires is paying attention to what the state courts actually have to say. We defer when state courts reasonably adjudicate claims of federal right, even if we think they're wrong. But if the state courts don't act reasonably, deference comes to an end. We certainly aren't required to defer to justifications that the state courts themselves did not consider.

Perhaps, as the dissent suggests, the officer's words could be "construed as having no effect on Doody's understanding of his right to counsel." Dissent at 3039. Maybe Doody wasn't listening to what the officer said, or maybe he didn't believe it. Of course, that's not what the state court said. Even if it were, it's entirely irrelevant. Miranda establishes an objective test. We can't uphold defective warnings because they might have been inadvertently successful, just as we can't disregard a properly administered warning because a particular suspect might have misunderstood.

Nor did anything in the Supreme Court's opinion in Duckworth cast doubt on the relevant legal principles. *See* Dissent at 3036-37, 3040. In that case, police told a suspect that they had "no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court" and that "[y]ou also have the right to stop answering at any time until you've talked to a lawyer." *Duckworth,* 492 U.S. at 198 (emphasis omitted). The Court of Appeals thought this wrongly implied that the right to counsel did not apply before a suspect went to court, but the Supreme Court held that the Court of Appeals had "misapprehended the effect" of the language. *Id.* at 203. The Court emphasized that the warning was entirely true and "accurately described the procedure for the appointment of counsel in Indiana," according to which invocation of the right to counsel would require police to cease questioning altogether unless the suspect paid for his own lawyer. *Id.* at 204. Nothing in the Court's opinion suggested that officers are permitted to make untrue statements that contradict the warnings required by *Miranda.* To the contrary, the Court reaffirmed that warnings must adequately "apprise the accused of his right to have an attorney present." *Id.* at 205.

Finally, the dissent would deny relief because "Doody was also looking at written warnings that clearly set forth his constitutional rights," and the Supreme Court has not "indicated what effect simultaneously acknowledged, written warnings might have when the oral warnings are unclear." Dissent at 3040. Even if the state court had

advanced this argument (it didn't), it would be unreasonable to think that the written warnings remedied the harm. They said:

> You have the right to have an attorney present prior to and during questioning. (This means, if you want one, you are allowed to have a lawyer here before and during my questions to you. An attorney is a lawyer who will speak for you and help you concerning the crime which we think you have done.)

There's nothing wrong with the written warnings, taken in isolation, but Doody read the warnings at the same time the officer offered his "explanation" of the scope of the right to counsel. The written warnings don't say that the right to counsel applies to the innocent as well as the guilty, and they don't contradict the officer's statement that the right would apply only if Doody was "involved." A reasonable suspect would assume that the oral warnings clarified the written ones. The written warnings cannot provide the "assurance" that Doody was aware of his rights that *Miranda* requires.

For over forty years, it has been clearly established that statements made during custodial interrogation cannot be admitted into evidence unless the defendant was adequately warned of his rights and the consequences of waiver. *See Miranda,* 384 U.S. at 479. The warnings required by *Miranda* are brief and very simple; most people-and certainly all police-know them by heart. It's not too much to ask that police recite them as prescribed by the

Supreme Court, and not augment them in a way that will obscure their meaning and undermine their effect.

Thanks to *Miranda*'s simple rule, this is a simple case. We'll never know whether Doody's statements were voluntary, but it's plain to see that he wasn't properly read his rights. We must grant his petition on that ground alone.

TALLMAN, Circuit Judge, with whom Judges RYMER and KLEINFELD join, dissenting:

I certainly understand the passion behind the majority's distaste for the facts of this case. I can see how a lengthy overnight interrogation of a seventeen and one-half year-old high school student can be off-putting-perhaps so off-putting that were we reviewing this issue from scratch on direct appeal, we might be tempted to fashion rules that would afford relief. But that is not the posture of this case. We are collaterally reviewing Jonathan Doody's conviction for the murder of nine people that was already upheld on direct review by the Arizona Court of Appeals, and our review is not *de novo*-as the majority treats it-but deferential.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the question before us is simply whether the Arizona state courts reasonably applied federal law and determined the facts in concluding that Doody's confession to participating in the murders was voluntary. Arizona conducted a ten-day evidentiary hearing and a thirty-four day trial.

Five judges and twelve jurors have thoroughly reviewed all of the circumstances surrounding the interrogation. All concluded Doody voluntarily confessed. My colleagues nonetheless parse the record, re-weigh the evidence, and reach a *de novo* determination that the written and oral *Miranda* warnings were inadequate and the confession was coerced. In doing so, the majority discards as objectively unreasonable the factual findings made by the trial court, the jury's considered verdict, and the well-reasoned opinion of the Arizona Court of Appeals.

The Supreme Court has repeatedly told us not to do this. *See, e.g., McDaniel v. Brown,* ___ S.Ct. ___ (2010) WL 58361, *7 (Jan. 11, 2010) ("[T]he [Ninth Circuit] Court of Appeals' discussion of the ... evidence departed from the deferential review that ... § 2254(d)(1) demand[s]."); *Knowles v. Mirzayance,* 129 S. Ct. 1411, 1419-20 (2009) ("The [Ninth Circuit] Court of Appeals reached [the wrong] result based, in large measure, on its application of an improper standard of review.... The question is not whether a federal court believes the state court's determination ... was incorrect but whether that determination was unreasonable-a substantially higher threshold.") (internal quotation marks omitted); *Waddington v. Sarausad,* 129 S. Ct. 823, 833 (2009) ("The reasoning of the [Ninth Circuit] Court of Appeals ... failed to review the state courts' resolution of this question through the deferential lens of AEDPA[.]"); *Uttecht v. Brown,* 551 U.S. 1, 10, (2007) ("The requirements of [AEDPA], of course, provide additional, and binding, directions to accord deference.... By not

according the required deference, the [Ninth Circuit] Court of Appeals failed to respect the limited role of federal habeas relief in this area prescribed by Congress and by our cases."); *Schriro v. Landrigan,* 550 U.S. 465, 475-80 (2007); *Carey v. Musladin,* 549 U.S. 70, 76-77 (2006); *Woodford v. Visciotti,* 537 U.S. 19, 25 (2002) ("An '*unreasonable* application of federal law is different from an *incorrect* application of federal law.' The Ninth Circuit did not observe this distinction, but ultimately substituted its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d).") (citation omitted).

But we are unrepentant and this court once again substitutes *its* judgment for the judgment of a state trial court and a state court of appeals. Because it does so, and because I believe that the Arizona courts' determinations were neither contrary to clearly established federal law as declared by the United States Supreme Court, nor an unreasonable application of it, I respectfully dissent.

I

A

In August 1991, Phoenix, Arizona, was rocked by nine brutal murders at a Buddhist temple. *State v. Doody,* 930 P.2d 440, 443 (1996). "The victims, including six Buddhist monks, lay face down in a circle, each shot execution-style in the head. Several of the victims had sustained additional, non-fatal shotgun wounds. Living quarters inside the temple had been ransacked, and items of personal property,

including money, cameras, and stereo equipment, were missing." *Id.* A massive investigation followed.

Prosecutors initially charged four men from Tucson, Arizona, with the murders. *Id.* Then, during a routine traffic stop on Luke Air Force Base near Phoenix, police found the .22 caliber rifle used to shoot the victims. *Id.* The owner of the rifle, Rolando Caratachea, denied any involvement in the murders, but said that his roommate, Jonathan Doody, and a friend, Alessandro Garcia, "had borrowed the rifle shortly before the murders." *Id.* at 444.

At that time, Doody was seventeen and one-half years old. He was born in Thailand but moved to the United States as a child with his American stepfather, who was in the Air Force, and his Thai mother. His mother and brother were members of the temple where the murders occurred, and his brother had been a novice monk there. Doody visited the temple when his brother was there. Doody spoke fluent but lightly accented English. He was a junior in high school, "maintained a B grade average," was commander of the junior Reserve Officers' Training Corps Honor Guard and Color Guard, and worked at the Luke Air Force Base Commissary. *Id.* at 445-46. Emancipated from his parents who had moved to Colorado, he lived in an apartment in Arizona with Caratachea and another friend.

Based on the scope of the crime-which required controlling nine victims while ransacking the temple and then methodically executing them-the police believed several people were involved. Maricopa

County Sheriff's detectives located Doody at a high school football game on a Friday night. *Id.* at 443-44. Detective Riley, who had spoken with Doody earlier in the investigation, explained there were now some additional questions about Caratachea's rifle and asked if Doody was willing to come to the Sheriff's office. Doody assented and climbed into the detectives' car.

When they arrived, Doody was placed in what had been the office of a deputy Maricopa County attorney rather than an interrogation room. An officer started a tape recorder. Although Doody was not yet a suspect, Detective Riley nonetheless advised him of his *Miranda* rights. Riley read each warning from the standard juvenile *Miranda* form, which he gave Doody to follow along. The written text that Doody simultaneously reviewed and initialed appears in the attached Appendix. From this document, the Arizona Court of Appeals could observe that Doody initialed each and every clearly worded *Miranda* warning. The *Miranda* form's very last admonition, clearly separated from the numbered warnings, stated, "If you want to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer." Doody indicated, by initialing the document, that he understood this right, too. At no time did he stop the questioning.

In addition to the printed text, Riley offered some explanation of each right. He paused after each one while Doody indicated he understood the printed

right and initialed each waiver on the form. Riley also told Doody several times that if he had any questions, he should feel free to ask. Doody declined to have a parent or attorney present and clearly expressed that he was willing to talk with the officers.

Detective Riley began the interrogation around 9:25 p.m. by questioning Doody about his roommate's rifle. "Doody initially denied any knowledge of the events at the temple but, after two and one-half hours, made inculpatory statements and, after approximately four more hours of questioning, admitted to being at the temple on the night of the murders." *Id.* at 444. Based on these admissions, the officers continued their questioning and Doody slowly became more forthcoming.

The interrogation ultimately lasted nearly thirteen hours. Over the course of the interrogation, Doody admitted he helped plan the assault on the temple with others, including Garcia. He recounted, "We borrowed the rifle ... to see if we [could] make a silencer...." Tape 11, p. 25. He answered "Yes" to the question, "Were you going to use the silencer in the temple?" *Id.* He said they "drove past the place twice." *Id.* at p. 3. It was "just going to be a joke and it just went downhill. We entered the temple, one through each door. Everything was done in clockwork...." Tape 10, p. 8. "We ... searched the place for any security." *Id.* at p. 12. "They were laying down ... face down." *Id.* at p. 14. "And then I guess, I don't know, somebody panicked or something, and started firing and then constant .22 fire." Tape 15, p.

13. "We ran out. Got into a car. We just took off." Tape 10, p. 14.

Doody claimed they intended only to conduct a "war game" to see if they could surround the building without setting off the security system, but his co-conspirators then ransacked the living quarters and gathered the victims. Doody maintained that someone else suggested they eliminate the witnesses after one of the monks recognized Gonzalez, and that he was sent outside the building to determine whether anyone could hear shots from inside when the nine killings occurred. Garcia, who was being separately questioned the same night, claimed it was Doody who insisted they "leave no witnesses," and Doody who pulled the trigger.

B

Based on their interlocking confessions and other incriminating evidence, Doody and Garcia were charged with robbery and murder. Early in pretrial proceedings, Doody moved to suppress his confession.[1] The trial court conducted an exhaustive evidentiary hearing, lasting ten days, to determine whether Doody's confession was voluntary. The officers who questioned Doody all testified, and the court heard all thirteen hours of audio tape from the

[1] Garcia also moved to suppress his own confession, but thereafter entered into a plea agreement in which he pled guilty to nine counts of first degree murder and one count of burglary. He also agreed to testify against Doody. In exchange, the prosecution agreed not to seek the death penalty against Garcia.

interrogation. Doody did not take the stand to contradict the officers. The court considered all of the relevant circumstances, credited the testimony of the detectives as to Doody's demeanor, and concluded Doody confessed voluntarily, after knowingly and intelligently waiving his constitutional rights. *Doody,* 930 P.2d at 445.

Doody proceeded to trial, which lasted thirty-four days. The jury heard all thirteen hours of Doody's interrogation as well as other corroborating evidence linking him to the crime. That evidence included incriminating statements Doody made to friends after the murders, his fingerprints located on loot taken from the temple, the fact that he made a substantial cash down-payment to purchase a car shortly after the crime (during which $2,650 in cash was taken), and Garcia's accomplice testimony. The jury was instructed that Doody's statement was not voluntary if it resulted from his "will being overcome by a law enforcement officer's use of any sort of violence, coercion, or threats, or by any direct or implied promise, however slight." *Id.* at 448.

The jury convicted Doody on every count. The jury found Doody liable for the nine murders on a theory of felony murder rather than premeditated murder. The trial court sentenced Doody to nine consecutive life terms for the murders and eleven additional prison terms on the remaining felony counts.

Doody appealed his convictions, arguing, *inter alia,* that the trial court erred in failing to suppress his confession. He claimed the totality of the

circumstances rendered the confession involuntary and that the *Miranda* warnings were inadequate. The Arizona Court of Appeals rejected both arguments in a lengthy reasoned opinion. It considered all of the circumstances surrounding Doody's confession, including his age and intelligence, the length of the interrogation, the absence of a parent, and the tone and tactics employed by the detectives throughout the interrogation. The court concluded the tactics were not unduly oppressive and Doody had confessed voluntarily. *Id.* at 446-48.

The Arizona Court of Appeals also rejected Doody's argument that the warnings were inadequate. Upon review of the audiotape of the warnings, the signed written waiver, and the interrogating officers' testimony regarding Doody's demeanor, the court found "the officers explained [Doody's] rights in a manner appropriate for his age and apparent intelligence." *Id.* at 449. The Court of Appeals affirmed Doody's convictions.

The Supreme Court of Arizona denied review and the Supreme Court of the United States denied Doody's petition for a writ of certiorari. The United States District Court for the District of Arizona denied Doody's subsequent federal habeas petition. A three-judge panel of our court, including two members of today's majority, reversed, holding the state courts were not objectively unreasonable in concluding the *Miranda* warnings were adequate, but ruling that Doody's confession was nonetheless involuntary because it lasted too long. The panel

granted habeas relief. We granted rehearing en banc.

II

Contrary to the majority's belief, the "elephant in the courtroom" here is the standard of review. *Wong v. Belmontes*, 130 S.Ct. 383, 390 (2009). Under AEDPA, we may not grant habeas relief unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's decision is an "unreasonable application of ... clearly established law" only if it is "objectively unreasonable." *Williams v. Taylor*, 529 U.S. 362, 409 (2000). A federal court may not issue a writ of habeas corpus merely because it concludes "in its independent judgment" that the state court erred. *Id.* at 411.

Nevertheless, the majority reviews the record as though it were the initial finder of fact or reviewing a federal conviction on direct appeal. The majority pays mere lip service to AEDPA and then proceeds as though it does not exist.

III

Miranda v. Arizona, 384 U.S. 436, 467 (1966), requires that an accused be "adequately and effectively apprised of his rights." When considering the adequacy of a *Miranda* advisement, "[t]he

inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.' " *Duckworth v. Eagan*, 492 U.S. 195, 202 (1989) (quoting *California v. Prysock*, 453 U.S. 355, 361 (1981) (per curiam)).

The warnings in this case were delivered as follows while Doody had the written warnings in the Appendix before him on the table:

> *Detective Riley:* Ah, what this is, is that ah you have the right to remain silent and ah, and what it states is that this means that you do not have to talk to me or answer any questions about ah, the matter that we're going to discuss with you, okay. You can be quiet if you, if you wish. Okay, did you understand that?
>
> *Doody:* Uh-huh.
>
> *Detective Riley:* Okay, ah, as we go here, they ah, they ask that you initial ah, here indicating that I read it to you and that you understand it. Ah, so if you could ah, as we go, I will go ahead and just have you initial in the box whether you do or don't.
>
> *Doody:* Okay.
>
> *Detective Riley:* Okay. And the next one is that anything that you say can and will be used against you in a court of law and what this means is that anything that you tell me, I

can use later against you in court and a court of law is a place where a judge will decide whether ah, you did something or whether you didn't do something, okay. And a judge is like an umpire in a baseball game. He decides whether you have acted in a right or wrong way, okay. Ah, if you did something wrong ah you may be punished and if you didn't you won't be punished, okay. Do you understand all of that?

Doody: Uh-huh.

Detective Riley: Okay, if you could just initial there. Okay, and the next one states that you have the right to have an attorney present prior to and during questioning, and what that means is that if you want one, you're allowed to have a lawyer here before and during you know my questions to you, okay. And then an attorney is a lawyer who will speak for you and help you concerning the crime or any kind of offense that ah we might think that you or somebody else was involved in, if you were involved in it, okay. Again, it [sic] not necessarily mean that you are involved, but if you were, then that's what that would apply to okay. And do you understand that?

Doody: Yeah.

Detective Riley: Any questions?

Doody: No.

Detective Riley: Okay. Okie doke.

Doody: Oh yeah what's this for?

Detective Riley: Ah, okay I'll, again I'm gonna go in and, and explain some things to you. Ah, in the next one states that if you cannot afford an attorney, you'd have the right to have one appointed for you prior to questioning okay, and what this means, is if you do not have the money to get a lawyer ah, if you wished ah, one will be given to you free of charge before any questions and things like that, okay. Do you understand that?

Doody: Uh-huh.

After delivering the *Miranda* warnings, Detective Riley asked Doody if he wished to have a parent or guardian present. Doody said he did not want a parent present and then expressly agreed to speak with the officers. Before asking any questions, Detective Riley confirmed that Doody was willing to talk, that he did not want a parent or an attorney present, and that Doody understood he could stop the interrogation "at any time":

[I]f ... you have no problem with ah talking to myself and David here right now, with ah, without anybody else present or an attorney, or your parents, or, or anyone ah, then as I said, we have some things we'd like to ask you and we'd like to do that. Ah, and if you have no

> problem with that, we'd like to talk to you about that. Ah, but if you want to then ah, to stop at any time, that's something you can do as well. Okay. Do you have any questions at all about any of these things I've, I've explained to you?

Doody replied, "No."

Following its pre-trial hearing, the trial court ruled these warnings were adequate. The Arizona Court of Appeals affirmed the trial court and found the warnings were delivered "in a clear and understandable manner" and "the officers explained [Doody's] rights in a manner appropriate for his age and apparent intelligence." *Doody,* 930 P.2d at 449. This factual finding fits easily within the bounds of federal law as determined by the Supreme Court of the United States. *See* 28 U.S.C. § 2254(d).

The Supreme Court has not decided a case with facts "materially indistinguishable" from the facts before us. *Williams,* 529 U.S. at 406. It has, however, clearly instructed us how to approach our adequacy analysis. The Supreme Court has never insisted that *Miranda* warnings be given verbatim as set forth in that opinion. *Duckworth,* 492 U.S. at 202; *United States v. Mejia,* 559 F.3d 1113, 1117 (9th Cir.2009). Indeed, the Court has repeatedly cautioned against rigid requirements as to the form of *Miranda* warnings.

In *California v. Prysock,* the suspect was advised that he had the right to a lawyer prior to and during

questioning; and that he had the right to a lawyer appointed "at no cost to yourself;" but was not advised that he had a right to an appointed lawyer prior to and during questioning. 453 U.S. at 356-57. The California Court of Appeal ruled that Prysock's statements must be suppressed because he was not advised of his precise right to have a lawyer appointed prior to questioning. *Id.* at 358-59. The United States Supreme Court reversed in a per curiam opinion, noting: "[n]othing ... suggests any desirable rigidity in the *form* of the required warnings." *Id.* at 359. *Miranda* did not require a "talismanic incantation ... to satisfy its strictures." *Id.* The Court required only a "*fully effective equivalent*" to the warnings spelled out in *Miranda*. *Id.* at 360 (quoting *Miranda,* 384 U.S. at 476).

In *Duckworth v. Eagan,* the Supreme Court found a misleading warning to be a fully effective equivalent of the *Miranda* warnings. 492 U.S. at 205. There, the suspect was advised: "You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.*" *Id.* at 198 (original emphasis). The Seventh Circuit concluded the warnings were invalid, explaining that reasonable citizens might understand the statement to "impl[y] that if the accused does not 'go to court,' i.e., the government does not file charges, the accused is not entitled to counsel at all." *Eagan v. Duckworth,* 843 F.2d 1554, 1557 (7th Cir.1988).

Notwithstanding the false implication, the

Supreme Court reversed the Seventh Circuit and found the warnings adequate. Although the warnings might have been confusing to a layman, it was technically correct as a matter of Indiana procedure. The Court cautioned, "[r]eviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'convey[] to [a suspect] his rights as required by *Miranda*.' " *Eagan,* 492 U.S. at 203 (quoting *Prysock,* 453 U.S. at 361. It acknowledged that officers may routinely "inadvertently depart from routine practice, particularly if a suspect requests an elaboration of the warnings." *Id.* Because the warnings "touched all of the bases required by *Miranda,*" the Supreme Court held Eagan's confession was admissible. *Id.*

Despite these admonishments against rigid requirements for administering *Miranda* warnings, the majority of our en banc panel now concludes the state courts were "objectively unreasonable" in finding the warnings adequate. It rests this conclusion on two alleged defects in the warnings: first, "significant deviations from the printed *Miranda* form and [Detective Riley's] repeated minimizing of the warnings' significance," Opinion at 2980; and second, Detective Riley's apparently misleading explanation of the right to counsel.

Were we reviewing this case on direct appeal, each of these might be legitimate grounds for debate. However, to interpret these portions of the record *de novo* without any regard for the state courts'

determinations, after the state trial court considered all of the evidence and watched the detectives testify, ignores AEDPA.[2] The majority insists that if we properly apply AEDPA we succumb to a "temptation to abdicate our responsibility on habeas review." Opinion at 2981. However, our responsibility on collateral habeas review is not to ask how *we* see the evidence-which is what the majority does-but to ask whether how the *state courts* viewed the evidence is objectively unreasonable under clearly established federal law. In this task we have neither a rubber stamp nor an eraser, just a nuanced duty to recognize the distinct role of both state courts and the federal system on habeas review.

Because the Supreme Court has not spoken on closely analogous circumstances, we ask only whether the Arizona courts reasonably applied the precedent available. The Supreme Court has explicitly condoned deviating from the script. It

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[2] The majority substitutes its judgment for that of the Arizona courts so many times that it becomes second nature, and thus, almost unnoticeable. Many times over the majority simply disagrees with the Arizona Court of Appeals, but labels any interpretation contrary to its own "unreasonable." For example, the majority writes, "To the contrary, the audiotapes demonstrate that the detectives' relentless and uninterrupted interrogation of an unresponsive juvenile was far from 'courteous.' " Opinion at 2994. This court cannot make that determination on habeas review under AEDPA. The majority even reasons, "Any doubt regarding this matter is easily resolved by listening to the audiotapes." *Id.* Under AEDPA, it is not our role to resolve "doubt" in the factual record and then conclude that the state court was unreasonable not to see it our way.

recognizes that officers may deviate from standard practice, particularly when giving additional explanation. *Eagan,* 492 U.S. at 203. It was reasonable for the Arizona Court of Appeals to interpret these cases as permitting some less-than-perfect *Miranda* advisements.

The warnings Doody received are not a model of English diction. They are nonetheless perfectly adequate to convey to a young man his basic rights. The essential rights are easily identifiable, and nearly all of the additional material clarifies, rather than obfuscates. The warnings are even clearer when heard on the audio tape, rather than read from the printed record. The colloquial filler ("ah," "like," "and things," "okay," etc.), which is distracting on the page, is largely filtered out when heard by the average listener. Even those of us who spend our days striking every unnecessary word from our written work commonly make, and hear, statements of less than perfect prose. We are nonetheless able to communicate and understand serious ideas. Moreover, the written warnings were simultaneously set before Doody and expressly acknowledged by him to clarify any confusion. *See* Appendix.

The gravity of Doody's situation was also clear. One of *Miranda*'s primary purposes is "to make the individual more acutely aware that he is faced with a phase of the adversary system-that he is not in the presence of persons acting solely in his interest." *Miranda,* 384 U.S. at 469. The warnings given here certainly serve that purpose. What Doody describes as "reassuring patter" intentionally designed to

"obscure and downplay" the importance of the warnings can be reasonably interpreted as explanation designed to focus Doody's attention on what was being said. Doody knew from the moment he got into the police car that the officers intended to question him about the murder weapon. Officer Riley clearly told Doody "anything that you tell me I can use later against you in court," and told him a judge would decide whether he had done something wrong, and if so, that he would be punished. Doody was therefore "aware not only of the privilege, but also of the consequences of forgoing it." *Id.* Although the explanations and tone were calibrated to put Doody at ease, Officer Riley did not joke or make light of the warnings. *Compare with Cooper v. Dupnik*, 963 F.2d 1220, 1228-29 (9th Cir.1992) (en banc), *overruled on other grounds by Chavez v. Martinez*, 538 U.S. 760 (2003).

Nor did Officer Riley's explanation of the right to counsel obscure the fundamental import of the right. After reading the right to counsel, Riley said, "not necessarily meaning that you are involved, but if you were, then that's what[the right to counsel] would apply to, okay?" The majority claims this explanatory sentence "could be construed to suggest that one would only ask for an attorney if he was guilty." True. It *could* be construed that way. However, it could also be construed to reinforce that Doody was "faced with a phase of the adversary system," *Miranda*, 384 U.S. at 469, or construed as having no effect on Doody's understanding of his right to counsel. A *Miranda* warning serves to make the individual more acutely aware "that he is not in the

presence of persons acting solely in his interest."[3] *Id.* To that end, Officer Riley explicitly stated that he was reading the warnings so that Doody understood "some of the *protections* " he had, and that "it's for your *protection*."[4] Tape 1, pp. 2, 4 (emphasis added). The Arizona courts heard the audio tape of the warnings, saw Doody's initials next to each warning on the juvenile *Miranda* form, and listened to the testimony of the administering officers who testified that Doody "exhibited no signs of doubt or confusion." *Doody,* 930 P.2d at 449. The conclusion that "the officers advised Doody of his *Miranda* rights in a clear and understandable manner," *id.,* was not objectively unreasonable.

Eagan addressed materially different facts from the ones before us, but the state courts could reasonably conclude the circumstances here counsel the same result. The warnings in *Eagan* could have confused or misled a layman, but were technically correct as a matter of Indiana procedure. The written warnings Eagan received contained the same language and would have done nothing to dispel any confusion. *Eagan,* 492 U.S. at 198. Here, the oral warnings themselves were stated correctly, but one

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[3] Indicative of this notion is the very first sentence of the majority's discussion of the warnings where it quotes Miranda's requirement that the prosecution demonstrate "the use of procedural *safeguards* effective to secure the privilege against self-incrimination." Opinion at 2979 (quoting *Miranda,* 384 U.S. at 444) (emphasis added).

[4] Given that the officers plainly said the warnings were for Doody's protection, it is beside the point that they also said the warnings protected them as well.

sentence of Officer Riley's explanation *might* have been open to misinterpretation. But unlike Eagan, Doody was also looking at written warnings that clearly set forth his constitutional rights. Doody's receipt and acknowledgment of the written warnings-which no one claims were unclear or incorrect, in fact the concurrence admits "[t]here's nothing wrong with the written warnings," Concurrence at 3024-alleviates any ambiguity or misinterpretation. *See* Appendix.

A state court, earnestly trying to apply *Eagan* to the facts at hand, could reasonably conclude these combined warnings "touched all of the bases required by *Miranda*," and "reasonably 'conveyed] to [a suspect] his rights as required by *Miranda*.' " *Eagan*, 492 U.S. at 203. The Supreme Court has not addressed a case in which an officer inadvertently makes an ambiguous elaborating statement that conflicts with otherwise-accurate spoken warnings. Nor has the Court indicated what effect simultaneously acknowledged, written warnings might have when the oral warnings are unclear. On this basis alone, the Arizona Court of Appeals' conclusion was not objectively unreasonable. *See Musladin*, 549 U.S. at 77 ("Given the lack of holdings from this Court regarding ... conduct of the kind involved here, it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established federal law.' " (Quoting 28 U.S.C. § 2254(d)(1))).

The Arizona Court of Appeals reviewed all of the evidence available and applied the correct federal standard in evaluating the adequacy of the

warnings. It concluded the spoken and written warnings reasonably conveyed Doody's constitutional rights. This application of *Miranda*, *Prysock*, and *Eagan* was not objectively unreasonable. The majority's contrary conclusion rests on its *de novo* interpretation of the record and total disregard for the state courts' factual findings and reasoned decisions, in contravention of AEDPA.

IV

Whether *Miranda* warnings were adequate and whether a confession was voluntary are closely related inquiries. "[F]ailure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. Conversely, giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility." *Missouri v. Seibert*, 542 U.S. 600, 608-09 (2004) (plurality opinion) (footnote omitted). Because I would conclude the warnings were adequate, I proceed to consider the other circumstances relevant to the question of voluntariness. Because the majority would conclude the warnings were inadequate, its voluntariness analysis is gratuitous, highlighting a dogged determination to quarrel with the factual record as much as possible.

"[C]ourts look to the totality of circumstances to determine whether a confession was voluntary." *Withrow v. Williams*, 507 U.S. 680, 693 (1993). Those circumstances include police coercion; the length of the interrogation; its location; its continuity; and the

defendant's maturity, education, physical condition, and mental health. *Id.* Issuance of valid *Miranda* warnings is a particularly weighty factor: "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433, n. 20 (1984).

To overcome the factual obstacles, the majority attempts to paint Doody as a tender youth, lacking intellect or sophistication, younger than his chronological age of seventeen and one-half years.[5] But the facts as found here by the Arizona judges do not support such a characterization. The Arizona Court of Appeals reviewed the evidence presented at the ten-day evidentiary hearing, including all thirteen hours of the audio-taped interrogation. It made, or adopted from the trial court, a number of express factual findings supporting its legal analysis. These findings recite Doody's age, education, and school activities, including that he was six months from the age of majority, maintained a B grade average, held the position of commander of the ROTC Honor Guard and Color Guard, was employed on the military base, and that he spoke English fluently and displayed no signs of mental disability.

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[5] Particularly indicative is the majority's heavy reliance on the Supreme Court's 1948 opinion in *Haley v. Ohio*, 332 U.S. 596, 598 (1948), where the Court characterized the suspect-questioned for five hours straight and, as he maintained, beaten-as a fifteen-year-old African American "lad" still living with his mother. *Id.*

Doody, 930 P.2d at 445-46.

The Court of Appeals also concluded Doody was adequately informed of his *Miranda* rights. It found that, although the interview lasted nearly thirteen hours, Doody admitted to borrowing the murder weapon after about two and one-half hours and began to make a full confession after about six hours. "The officers used a variety of approaches in questioning Doody" but maintained a "courteous, almost pleading style of questioning during most of the interview." *Id.* at 446.

The officers allowed Doody to take bathroom breaks and offered him food and drinks throughout the interrogation.[6] *Id.* The Court of Appeals also carefully noted the jury's voluntariness finding: "[i]n this case, as in all others, the jury was the ultimate arbiter of voluntariness, and [was] free, in effect, [to] disagree with the judge, and reject the confession." *Id.* at 448 (quotation omitted, alterations in original).

The Arizona Court of Appeals identified the

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[6] The majority faults the officers because according to its interpretation of the transcript the first break comes nine hours into the interview. Opinion at 2991. Yet, the officers paused questioning less than four hours into the interview to offer Doody something to drink and a bathroom break. At the end of Tape 3, Detective Riley asks, "Are you a little thirsty?" Doody responded, "Not quite, no." Detective Riley then states, "You sure? You look like you're a little bit thirsty, you want to go to the bathroom or anything?" Doody states, "No." Detective Riley then ensures, "You sure? Okay." The majority's suggestion that the officers were insensitive to Doody's need for relief throughout the interrogation is belied by this record.

correct federal constitutional standards, looking to "the totality of the circumstances surrounding the confession and determin[ing] whether the will of the defendant has been overborne."[7] *Id.* at 445. The Court of Appeals also noted that juvenile confessions require the " 'greatest care,' " and proceeded to " 'evaluate whether police conduct was coercive in the context of a juvenile confession by carefully scrutinizing not only the external circumstances under which the juvenile was questioned but also the juvenile's reasonably apparent cognitive abilities.' " *Id.* (quoting *State v. Jimenez*, 799 P.2d 785, 790 (Ariz. 1990) (citing *In re Gault*, 387 U.S. 1, 55 (1967))).

Applying this standard to the facts found above, the Court of Appeals concluded the confession was voluntary. It did not make this determination lightly or casually. The court noted each of the most disturbing circumstances and cited specific facts that counter-balanced those concerns. The "troublesome length" of the interrogation was offset by the fact that Doody had admitted after only two and one-half hours that he had possessed the murder weapon and confessed to participating in the temple robbery approximately four hours later. *Id.* at 446. The interrogation lasted through the night, but the audio tapes confirmed the officers' testimony that Doody did not seem overly tired or distraught. *Id.* The officers engaged in numerous interrogation

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[7] The majority inexplicably asserts the state court unreasonably applied federal law by failing to weigh "the totality of the circumstances." Opinion at 2997.

techniques, which the trial court characterized as "aggressive, energetic [and] forceful," *id.*, but they were not egregious or beyond the bounds of federal law, *id.* at 447-48.

Doody did not have a parent present, but, as the court noted, he had said he "did not care" whether his parents were there and agreed to speak to the detectives alone. *Id.* at 446. He was also living on his own with friends, not his family. On the basis of this extensive and thoughtful analysis, the Arizona Court of Appeals concluded the confession was voluntary. As Chief Judge Kozinski notes in his concurrence, "This is precisely the kind of debatable application of a 'general standard' where finality and respect for the independent judgment of the state courts counsels the highest deference on federal habeas review." Concurrence at 655 (citing *Knowles,* 129 S.Ct. at 1420).

The majority cannot point to any significant fact or circumstance that the Arizona Court of Appeals failed to consider in reaching this conclusion. The majority claims Doody's age is of "critical importance." Of course it is important. That is why the state courts explicitly considered it. *Doody,* 930 P.2d at 445 (noting Doody's age and reciting the correct legal standard for review of juvenile confessions). The Court of Appeals noted several facts showing Doody was mature for his age, including that he commanded the ROTC Honor Guard and Color Guard and held a job at the Luke Air Force Base commissary, *id.*; evidence in the record further showed that Doody was the oldest of

four children, lived in an apartment emancipated from his parents, signed his apartment lease for himself and his roommates, bought two cars on his own, and participated in the Civil Air Patrol, which comported with his plans for college and possibly joining the Air Force or Navy as a pilot.

The Court of Appeals also discussed the possibility of police coercion, *id.* at 447-48; the length of the interrogation, *id.* at 446; its continuity, *id.* (noting that the interrogation lasted thirteen hours without significant breaks but also that the officers "offered Doody food and drinks and accommodated his requests to use the restroom"); and Doody's maturity, education, physical condition, and mental health, *id.* at 445-46 (discussing Doody's education, grade average, school activities, that there was "no indication of any mental disorder," and condition during the interrogation).[8] *See Withrow,* 507 U.S. at 693 (requiring consideration of police coercion, the length of the interrogation, its location, its continuity, and the defendant's maturity, education, physical condition, and mental health). Of course, the Court of Appeals also devoted an entire section of the opinion to the *Miranda* warnings. *Doody,* 930

[8] The only factor the Court of Appeals apparently omitted was the location of the interrogation. Other than noting the interview took place at the police station, the state court did not describe the physical surroundings. If anything, this factor would cut in favor of voluntariness. In contrast to a typical stark interrogation room, Doody's interrogation took place in what had been the office of a Maricopa County attorney, roughly ten feet by eighteen feet in size, well-lit, with carpeted floors and padded chairs. The officers did not lock the door.

P.2d at 448-49.

The state court correctly applied federal law to its factual conclusions. Each relevant circumstance, and many combinations of similar circumstances, have been addressed by the Supreme Court and circuit courts of appeal,[9] and the resulting confessions held voluntary. We have repeatedly held a suspect's minor age and the absence of a parent do not make a confession presumptively involuntary. *See Juan H. v. Allen,* 408 F.3d 1262, 1273 (9th Cir.2005) (fifteen-year-old suspect's confession voluntary though police implored him to cooperate and misrepresented legal implications of admitting involvement); *United States v. Doe,* 155 F.3d 1070, 1075-76 (9th Cir.1998) (en banc) (seventeen-year-old suspect's *Miranda* waiver and confession were voluntary, even though his parents were not present, where juvenile did not appear to be intoxicated, was not handcuffed, did not have trouble understanding the questions, the investigating officers did not make any threats or promises of any kind, and juvenile never asked that his parents be notified or that they be present).

Federal courts have also held lengthy interrogations are not per se coercive. *See Clark v. Murphy,* 331 F.3d 1062, 1073 (9th Cir.2003)

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[9] "While circuit law may be 'persuasive authority' for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied." *Clark v Murphy,* 331 F.3d 1062, 1069 (9th Cir.2003) (internal citations omitted).

(defendant's confession was voluntary though he had been held and intermittently questioned in a small room for eight hours); *Jenner v. Smith,* 982 F.2d 329, 334 (8th Cir.1993) (six or seven hour questioning not coercive); *United States v. Lehman,* 468 F.2d 93, 101 (7th Cir.1972) ("vigorous" eight hour questioning with few breaks did not make confession involuntary). "Even if we assume that the interrogation lasted all day ... coercion typically involves far more outrageous conduct." *United States v. Haswood,* 350 F.3d 1024, 1028 (9th Cir.2003).

The majority attempts to distinguish these cases as not involving both a seventeen and one-half year old suspect and a thirteen-hour interview. However, the Supreme Court has not addressed a case with facts such as those presented here. The majority does not claim that the Court has, yet it nevertheless concludes that the Arizona Court of Appeals, not only incorrectly, but unreasonably applied nonexistent Supreme Court precedent. Such a holding is not only violative of § 2254(d), but is also wholly irrational. While a right may be clearly established even without a Supreme Court case addressing materially indistinguishable facts, the majority cannot point to a single case that would have put the Arizona Court of Appeals on notice of a *per se* rule that a seventeen and one-half year-old defendant cannot make a voluntary confession six hours into a thirteen-hour interview.

In fact, the case that serves as the backbone of the majority's attempt to refute this dissent, *Haley,* 332 U.S. at 600, is readily distinguishable. In *Haley,*

the defendant was a fifteen-year-old African American "lad" in 1945 Ohio, *id.*, arrested at his home where he lived with his "closest friend-his mother," *id.*, taken to police headquarters, reportedly beaten, denied contact with his mother, and "not advised that he was not obliged to talk, that it was his right if he chose to say not a word, nor that he was entitled to have the benefit of counsel or the help of his family," *id.* at 604. The chief of police even "admitted that while he knew the boy 'had the right to remain mute and not answer any questions,' he did not know that it was the duty of the police to apprise him of that fact." *Id.*

Here, valid pre-printed *Miranda* warnings were read to Doody verbatim before the disputed explanations; the officers did not beat Doody; Doody was held for thirteen hours rather than "days," *id.*; the officers expressly asked Doody if he wanted his parents present; the officers knew, and advised Doody, that he had the right to remain silent; and most importantly, Doody was not a fifteen-year-old "lad" living with his closest friend-his mother-but was instead a seventeen and one-half year-old commander of the ROTC Honor Guard living independently of his parents with his closest friend-the provider of the murder weapon-Rolando Caratachea.[10]

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[10] We would not be the first circuit to distinguish *Haley* on such bases. *See United States ex rel. Hayward v. Johnson*, 508 F.2d 322, 326 (3rd Cir.1975) (distinguishing on the basis that suspect was "informed of his right to remain silent"), *overruled on other grounds by Patterson v. Cuyler*, 729 F.2d 925 (3rd Cir.1984); *Rogers v. Quarterman*, 555 F.3d 483, 495 (5th

The majority argues that the Arizona Court of Appeals should have been mindful of the "tender age" of Doody, just as the Supreme Court was mindful of the "tender age" of Haley. Notwithstanding the materially distinguishable facts of the two cases, the Arizona Court of Appeals did expressly consider Doody's age. *Doody,* 930 P.2d at 449. "More to the point, the question is not whether a state court could plausibly extend *Haley* to this fact pattern, a point we need not decide; the question is whether the [state] courts acted unreasonably in declining to extend this pre-*Miranda* precedent here. They did not." *Jackson,* 525 F.3d at 435.

Nor were the Arizona courts required to find "outrageous conduct" in the officers' interrogation tactics. "The policeman is not a fiduciary of the suspect. The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they just are not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible." *United States v. Rutledge,* 900 F.2d 1127, 1130 (7th Cir.1990). Absent physical coercion, police are permitted to engage in a variety of psychologically coercive interrogatory tactics. *See Haynes v. Washington,* 373 U.S. 503, 514-15 (1963). The

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Cir.2009) (distinguishing on the basis that suspect was not "subjected to physical abuse" and was "detained for a period of hours rather than days"); *Jackson v. McKee,* 525 F.3d 430, 435 (6th Cir.2008) (distinguishing on the basis that suspect "by contrast, was older (17 years old)"); *Hardaway v. Young,* 302 F.3d 757, 763 (7th Cir.2002) (distinguishing on the basis that suspect "was held for less than one day rather than three").

officers here employed most of them: the good cop/bad cop routine, lecturing on the importance of telling the truth, appeals to Doody's courage and honor, urging him to act like a man, advising him that other participants were talking and pointing fingers at Doody, expressing concern for the safety of Doody's family, and plain dogged persistence in their questioning.

These techniques are not new. Nor are they unconstitutional. For instance, police may encourage a suspect to cooperate and imply the suspect will be treated leniently for doing so. *See Rutledge,* 900 F.2d at 1128, 1130, 1131 (finding confession voluntary where police made "not quite truthful" statement that "all cooperation is helpful," though confession actually exposed Rutledge to a heavier sentence). This is true even when the suspect is a juvenile. We have upheld voluntariness findings where officers implored a fifteen-year-old suspect to cooperate and "misrepresented the serious potential legal consequences [the suspect] would face were he to admit involvement." *Juan H.,* 408 F.3d at 1273. "It is not enough, even in the case of a juvenile, that the police 'indicate that a cooperative attitude would be to [the] benefit' of an accused unless such remarks rise to the level of being 'threatening or coercive.' " *Id.* (quoting *Fare v. Michael C.,* 442 U.S. 707, 727 (1979)).

Deception is also a permitted tactic. "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns."

Illinois v. Perkins, 496 U.S. 292, 297 (1990). "'[T]rickery is not automatically coercion. Indeed, the police commonly engage in such ruses as suggesting to a suspect that a confederate has just confessed or that police have or will secure physical evidence against the suspect.'" *United States v. Crawford*, 372 F.3d 1048, 1061 (9th Cir.2004) (quoting *United States v. Byram*, 145 F.3d 405, 408 (1st Cir.1998)); *see also Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (holding that confession was voluntary even though the officer falsely told the suspect that his co-conspirator had confessed to the crime).

Persistent questioning must be permissible, for "[f]ew criminals feel impelled to confess to the police purely of their own accord, without any questioning at all." *Miller v. Fenton*, 796 F.2d 598, 604-05 (3d Cir.1986) (citing *Stein v. New York*, 346 U.S. 156, 186 (1953) ("Of course, these confessions were not voluntary in the sense that petitioners wanted to make them or that they were completely spontaneous, like a confession to a priest, a lawyer, or a psychiatrist. But in this sense no criminal confession is voluntary."), *overruled on other grounds by Jackson v. Denno*, 378 U.S. 368, 391 (1964)); *see also Haynes*, 373 U.S. at 514-15 ("Of course, detection and solution of crime is, at best, a difficult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement. And, certainly, we do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement.").

Although the officers were persistent, they were not coercive, and the Arizona courts reasonably concluded Doody's "confession [was] the product of an essentially free and unconstrained choice by its maker." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

Contrast the circumstances of Doody's interrogation with other Supreme Court cases finding truly coercive circumstances. *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 396-402 (1978) (suspect interrogated for four hours in intensive care unit, with tubes in his throat and nose, heavily medicated, after being shot, despite explicit request for counsel); *Darwin v. Connecticut*, 391 U.S. 346, 347-49 (1968) (per curiam) (suspect interrogated for 48 hours incommunicado while officers denied access to counsel); *Greenwald v. Wisconsin*, 390 U.S. 519, 519-21 (1968) (per curiam) (defendant, with a ninth grade education, was questioned without *Miranda* warnings for over eighteen hours and prevented from eating, sleeping, and taking his medication); *Beecher v. Alabama*, 389 U.S. 35, 36-38 (1967) (per curiam) (officer fired rifle next to suspect's ear and said "If you don't tell the truth I am going to kill you"); *Clewis v. Texas*, 386 U.S. 707, 709-12 (1967) (suspect was arrested without probable cause, interrogated for nine days with little food or sleep, and gave three unwarned "confessions" each of which he immediately retracted); *Davis v. North Carolina*, 384 U.S. 737, 745-53, (1966) (defendant was interrogated "daily" for sixteen days, during which no one other than the police spoke to him, and during which he was fed an "extremely limited" diet); *Reck v. Pate*

367 U.S. 433, 439-42, n. 3 (1961) (mentally retarded youth interrogated incommunicado for a week "during which time he was frequently ill, fainted several times, vomited blood on the floor of the police station and was twice taken to the hospital on a stretcher"). It was entirely reasonable for the Arizona courts to conclude Doody's confession did not fall into this category.

In light of the Arizona courts' extensive findings and careful application of federal law, the best the majority can do is to mischaracterize the state court findings and re-evaluate the record. The majority first attacks the Court of Appeals' finding that Doody was "alert and responsive," claiming he was actually non-responsive and often silent.[11] The state court never said Doody spoke constantly or answered every question. The Court of Appeals explicitly noted that "Doody did not speak for long periods during the interrogation." *Doody,* 930 P.2d at 447. The majority wants to interpret Doody's failure to answer certain questions as "unresponsive." The Arizona Court of Appeals obviously viewed his failure to immediately answer in a more sinister light; Doody could have been thinking up a tale explaining his admission that he was at the murder scene in a non-incriminatory fashion. Doody ultimately stated that he was at the temple but outside when the murders occurred.

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[11] The majority neglects to mention that Doody becomes talkative, forthcoming, and almost chatty in the last several hours of the interrogation. He provides most of the details of the crime with minimal prompting from the officers.

The finding that he was "alert and responsive" was not unreasonable, even in light of Doody's silence, for there is more to alertness than perpetual chatter. Doody could certainly have been pondering the consequences of truthfully answering the detectives' questions. Of course, silence may be indicative of inattention or unresponsiveness, but visual clues and physical demeanor must also be considered. The majority goes to great length to note that Doody sat in a chair with a "straight, immobile back." Opinion at 2991; *see also* Opinion at 2987, 2998. If anything, this would bolster the detectives' observations as to Doody's alert and responsive demeanor. The audio tapes, though certainly better than a cold transcript, cannot provide this information. Only the detectives who interrogated Doody could provide that, and they swore that Doody was "alert and responsive throughout the interrogation and did not appear overtired or distraught." *Doody*, 930 P.2d at 446. Doody declined to testify at the evidentiary hearing, so the record is devoid of direct evidence contradicting the officers' description. *Id.*

Because the trial court explicitly credited that testimony, the majority commits reversible error in dismissing the state court's finding as an "unreasonable determination of the facts." The majority again misconstrues the limits of our review under § 2254(d) in this respect. The majority argues that "assuming that there was *equivocal* evidence of responsiveness, the Arizona Court of Appeals' finding that *no evidence* supported Doody's claim was *unreasonable*." Opinion at 2994 (first and third

emphases added). Yet, because "Congress specifically used the word 'unreasonable,' and not a term like 'erroneous' or 'incorrect,' a federal habeas court may not grant relief simply because it concludes in its independent judgment that the relevant state-court decision" was erroneous or incorrect. *Williams*, 529 U.S. at 366. The majority fundamentally alters our scope of review by ignoring this distinction. *See Brown*, 551 U.S. at 10 ("By not according the required deference, the [Ninth Circuit] Court of Appeals failed to respect the limited role of federal habeas relief in this area prescribed by Congress and by our cases.").

The majority next deems unreasonable the finding that "the audio tapes reveal a courteous, almost pleading style of questioning during most of the interview." *Doody*, 930 P.2d at 446; Opinion at 2994. The majority reviews the tapes and scolds that the officers' tones were "far from pleasant." This was no tea party. The state court did not treat it like one. The officers were unquestionably persistent in seeking, and sometimes demanding, information. That is what we pay them to do. But it is entirely accurate to say the officers were "courteous, almost pleading" for "*most* of the interview" (emphasis added). Finding a courteous tone for *most* of the interview does not conflict with the fact that the officers were *sometimes* sarcastic, demeaning, and unpleasant.

For hours at a time, the officers pleaded, cajoled, and implored in soft voices. Their questions were nearly inaudible on the tape at some points. For

several additional hours, particularly at the beginning and end of the interview, the officers asked questions in conversational tones. Even in the early hours of the morning, when the officers were most demanding and unpleasant, they did not scream or shout. They did not threaten Doody in any way. They did not pound the table or throw objects around the room. They did not put words in Doody's mouth as to how the murders had been planned or committed. If we are going to say that mere persistence in interrogation renders a confession involuntary, and that a suspect's will is overborne by insistently repeated questions, and moreover that it's objectively unreasonable for a court to decide otherwise, then there is no rational stopping point in our voluntariness analysis.[12]

Indefatigable in its mischaracterization of the state court's findings, the majority next claims that, "contrary to the finding of the Arizona Court of

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[12] The majority's conclusion that the police "undoubtedly" used the same interrogation techniques against Doody as they did in procuring the Tucson Four's confessions, Opinion at 643, is remarkable, considering the Court of Appeals found that Doody had waived that contention as part of a due process claim. He convinced the trial court to admit the Tucson Four's confessions by arguing they were *true* and reasonably showed someone else committed the crime. *Doody*, 930 P.2d at 449-50. The Court of Appeals also found that Doody made "no [ ] showing" in state court that the circumstances of the Tucson Four confessions were relevant to his own, and that "the record disclose[d] substantial differences in approach and questioners" between Doody's and the Tucson Four's interrogations. *Id.* at 450-51. Doody fails to challenge these state court findings on appeal while the majority simply ignores them, again in disregard of AEDPA.

Appeals, Doody decidedly did not admit to involvement in the temple murders after two and one-half hours of questioning." Opinion at 644. The Court of Appeals did *not* say Doody "admitted to involvement" after two and a half hours. It said, "Doody admitted he had borrowed Caratachea's rifle at the time of the temple murders." *Doody*, 930 P.2d at 446. This is a reasonable finding of fact. Doody said he borrowed the rifle "close to the end of June." The murders occurred in August. Considering the Court of Appeals reviewed the case roughly five years later, "at the time" reasonably describes the time frame. It is disingenuous to re-write the state court's findings in order to declare them "patently unreasonable." Opinion at 2996. Although not conclusive, the inculpatory admission that he possessed the murder weapon before the temple invasion provided a strong basis for the officers to believe Doody had some involvement in the robbery and murders.

Finally, the majority faults the Court of Appeals for analyzing "the individual circumstances of the interrogation without weighing the totality of the circumstances." Opinion at 2997. Given that federal law requires state courts to examine a long list of particular factors, this criticism is utterly confounding. Had the state court merely alluded to a vast morass of evidence and stated a summary conclusion, we might arguably reverse for failure to explicitly consider all the relevant circumstances. The majority now implies that individual consideration of each important factor is error. A state court earnestly trying to follow our dictates

might as well throw in the towel.

V

The majority's lengthy recital of the facts highlights the fundamental error in its approach. Despite the prolific factual recitation, the majority leaves key sentences, exchanges, and pages of transcript unaccounted for. The majority quips that the dissent would "prefer that these audiotapes not see the light of day." Opinion at 3013, n.9. To the contrary, if the majority is going to ignore AEDPA and parse the record, then *all* of the transcripts should see the light of day, not just pre-selected snippets. Rather than deferring to the reasoned decisions of the Arizona state courts, the majority re-weighs the facts, parses the transcript, and dismissively ignores the state court findings. The opinion manifests a flagrant disregard of our role as federal appellate judges and the comity enshrined in AEDPA's statutory commands.

The Arizona courts did everything we can demand of state courts. The trial court held a ten-day evidentiary hearing before concluding the *Miranda* warnings were adequate and the confession was voluntary. More importantly, the jury independently and necessarily concluded the confession was voluntary and reliable in convicting Doody for his role in the murders. The Arizona Court of Appeals affirmed this determination in a comprehensive, reasoned opinion. Its holding on the facts presented fell squarely within the bounds of Supreme Court precedent on voluntariness. In sum, sixteen Arizona

factfinders concluded Doody's confession was voluntary. 28 U.S.C. § 2254(e)(1) cloaks those findings with a presumption of correctness. Doody fails to meet his statutory burden to rebut them by "clear and convincing evidence." *Id.*

In violation of AEDPA, the majority adjusts the scales and weighs the facts anew. This sort of appellate factfinding on habeas review is contrary to the congressionally mandated standard of review. It also creates unpredictability for habeas petitioners, attorneys, and state and federal courts. "We have been told before that objectively *unreasonable* means something more than we think the state courts were wrong. '[A]n unreasonable application of federal law is different from an *incorrect* application.' " *Anderson v. Terhune,* 516 F.3d 781, 800 (9th Cir.2008) (en banc) (Tallman, J., dissenting) (quoting *Williams,* 529 U.S. at 410). Such careless dismissal of reasoned findings is demoralizing and insulting to the state courts, eschewing the principle that "comity between state and federal courts has been recognized as a bulwark of the federal system." *Allen v. McCurry,* 449 U.S. 90, 96 (1980).

With little more than a hat tip to the state courts' extensive findings, the majority nonetheless concludes these findings were "objectively unreasonable." The majority's message to our state courts is clear: no matter how carefully you decide constitutional issues in criminal cases, no matter how well you justify your opinions with evidence of record, we will cast your work aside simply because we disagree. We should instead give the reasonable

findings of the Arizona courts the deference to which they are entitled under AEDPA.

Appendix

Appendix

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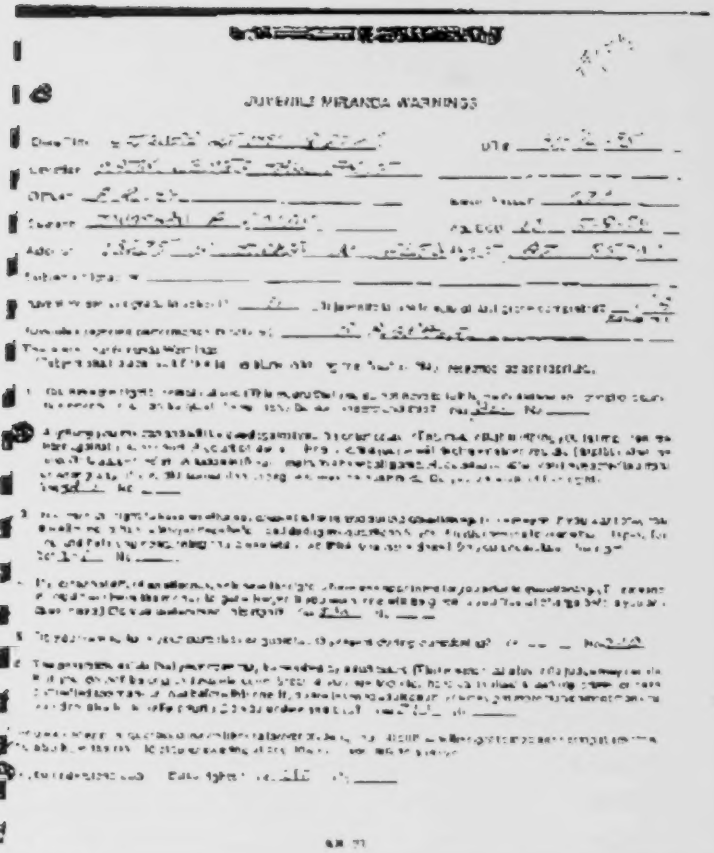

JUVENILE MIRANDA WARNINGS

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 09-1443 MAY 25 2010

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

JOHNATHAN ANDREW DOODY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDICES B – F TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX B

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DISTRICT OF ARIZONA
BY s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZIONA

Jonathan Andrew Doody,	) No. 98-0528 PHX-EHC
	) (LOA)
Plaintiff,	)
	) **AMENDED REPORT AND**
vs.	) **RECOMMENDATION**
	) **AND ORDER**
Meg Savage, et al.,	)
	)
Defendants.	)
	)

This matter arises on Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (document # 1) alleging the following grounds for habeas relief:

1) Police failed property to administer Petitioner's Miranda[1] rights;

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[1] Miranda v. Arizona, 394 U.S. 436 (1966).

2) Petitioner's confession was involuntary in violation of the Due Process Clause; and

3) The trial court improperly prohibited Petitioner from arguing to the jury that the confessions of the "Tucson Four", which were determined to be false, demonstrated the unreliability of Petitioner's confession.

(documents # 1; #2 at i)

On December 6, 1999, the undersigned issued a Report and Recommendation recommending that the Petition be denied. (document # 12). On April 3, 2003, the District Judge referred this matter back to the undersigned for further consideration in view of the Ninth Circuit's decision in Alvarado v. Hickman, 316 F.3d 841 (9th Cir. 2003), *cert. granted*, Yarbough v. Alvarado, 2003 WL 21229273 (2003). That same day, the undersigned directed the parties to submit supplemental briefing which they have done. (document # 24, # 28, #31)

After review of the record in this matter, the undersigned issues this Amended Report and Recommendation. Although the Amended Report and Recommendation supersedes the 1999 report and Recommendation, in the interest of clarity, the Court will vacate the earlier Report and Recommendation. (document # 12)

FACTUAL AND PROCEDURAL BACKGROUND

On February 11, 1992, the State of Arizona (the "State") charged Petitioner with nine counts of first degree murder, nine counts of armed robbery, and one count of conspiracy to

commit armed robbery. (document # 7) The following events gave rise to the charges.

On August 10, 1991, members of the Wat Promkunaram Buddhist Temple discovered nine dead bodies in the temple (the "Temple Murders"). (Appendix to document # 2 at A.2) The victims, each shot in the head, were lying face-down in a circle. (Id.) The temple had also been ransacked, various items were missing, including money, cameras, and stereo equipment. (Id.) The police later identified the murder weapon as a .22 caliber rifle manufactured by the Marlin Company (the "Marlin Rifle"). (Id.)

In September 1991, detectives received an anonymous tip implicating four men from Tucson (the "Tucson Four") in the Temple Murders. (Id.) The suspects made inculpatory statements during questioning prompting the State to charge them with the Temple murders. (Id.)

Thereafter, on October 10, 1991, two police officers, in particular Detectives Sinsabaugh and Harris, interviewed Petitioner regarding the Temple Murders. (document # 7, Exh. D at 58, 60) At that time, Petitioner was living with Michael Myers, Alex Garcia, and Rolando Caratachea. (document # 7, Exh. D at 56, Exh. I at 96-98, J at 45) Petitioner told police that his mother and step-father, Brian Doody, were moving to Colorado because his step-father had been transferred to Falcon Air Station. (document # 7, Exh. A at 116, D at 62-63) At a later point in the investigation, police arranged for Brian Doody and Petitioner's brother, David, to come to Phoenix to talk with police. (document # 7, Exh. D at 68, I at 94; J at 36) Police wanted to talk with David, who had been a member of the Temple, about the Temple and to identify property that had potentially been recovered from the Temple. (document # 7, Exh. D at 69-70, 139; I at 95; J at 37-38) Police paid travel

expenses and one night's lodging for Brian and David Doody. The two were interviewed on October 24, 1991 and began their return trip to Colorado the next day. (document # 7, Exh. B at 112-14, 117-18, C at 75-76; D at 71-72; J at 36)

In the meantime, police investigators had issued an advisory directing all law enforcement agencies to report any Marlin rifles. (Appendix to Document # 2 at A.2) A report came in from Luke Air Force Base that a Marlin rifle had been discovered during a search of a vehicle that had been stopped for an unrelated incident, and that Rolando Caratachea owned the rifle. (appendix to document # 2 at A.3) On October 24, 1991, investigators identified Caratachea's rifle as the murder weapon. (Respondents' Exh. S at 116-21; Exh. T at 195-226, 78-83[2]) On October 25, 1991, police questioned Caratachea who denied involvement in the murders and claimed that two minors, Petitioner and Alessandro (Alex) Garcia, had borrowed the rifle shortly before the incident. (Appendix to document # 2 at A.3; document # 7; Exh. I at 99-100) That evening detectives located Petitioner at an Agua Fria high school football game and asked if he would voluntarily accompany the detectives to the police station. (document # 7 Exh. A at 144-45, 149-50, 152-55, 159; Exh. B. at 54-60, 140, 142) Petitioner agreed. He opened the door of the police car and let himself into the back seat. (Id.) Petitioner was neither handcuffed nor searched. (document # 7, Exh. A at 154, Exh. B at 60-61, 65-67, Exh. I at 103)

When Petitioner arrived at police headquarters at 9:10 p.m., police read him juvenile Miranda warnings. (Appendix to

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[2] Unless otherwise indicated, citations to "Respondents' Exh. ___" are to exhibits attached to document # 7, Respondents' May 8, 1998 Answer to Petition for Writ of Habeas Corpus.

document # 2 at A.40-53; document # 7, Exh. B at 69, 77-78, 146, 148-54; Exh. D at 37; I at 102) Petitioner was then taken to a "well lit" room that was 10 feet by 18 feet, with carpeted floors and three padded chairs. (document # 7, Exh. B at 69, 70, 74) Petitioner agreed to speak to the detectives without his parents or an attorney present. (Appendix to document # 2 at A.3, A.40-53; document # 7 Exh B at 82, 147, Exh. D at 38) Police told Petitioner that they were going to ask him about the Temple murders and Caratachea's rifle. (document # 7, Exh. B at 88-89) They also told Petitioner he could stop the questioning at any time, and that he should ask if he "had a question about anything." (document # 7, Exh. B at 81, 88) Police also told Petitioner to ask he if wanted anything to eat or drink, or needed a break to use the bathroom. (Id. at 81, 89) Petitioner used the bathroom at least twice during the interview. (Id. at 162) Questioning continued until after 10:00 a.m. the next morning. (Appendix to document # 2 at A.3; and document # 28 Exh. B at 69, 146) Petitioner was interrogated by Detective Riley, Detective Dave Munley, Detective Sinsabaugh, and Captain Jerry White. A microphone allowed those outside of the interrogation room to hear the interrogation. (document # 7, Exh. B at 78-79) The interrogation was tape recorded, although Petitioner was not aware he was being taped. (Id. at 157-58)

During the interrogation, Petitioner told police that his parents had moved to Colorado and that he had since lived with several friends. (document # 7, Exh. B at 83) In August of 1991, Petitioner signed the lease for an apartment with Mike Myers and Rolando Caratachea. (Id. at 84-5, 151) He said that he had worked at McDonald's and was currently working at the commissary at Luke Air Force Base. (document # 7, Ex. B at 84) He also stated that he was "in charge" of the ROTC Honor Guard and Color guard. (Id. at 84, 150)

About 1 ½ to 2 hours into the interrogation, Petitioner admitted that he and Garcia had borrowed Caratachea's rifle. (document # 7, Exh. B at 99, 164, 169; Exh. C at 18, 23, 27) Petitioner modified his account of the events throughout the course of the questioning, but he ultimately admitted to being at the temple the night of the Temple Murders. (Id., cassette tape # 10[3]) Petitioner stated that Caratachea and Garcia approached him with a plan to play a "war game" which involved surrounding the temple without tripping the securing system. (Id. at A.3, cassette tape # 10) Petitioner stated that he devised the system to get passed the security sensors. (cassette tape # 11) Then, on August 9, 1991, Petitioner accompanied Caratachea, Garcia, George Gonzalez, and several others to the temple. (Id.) Petitioner claimed that he did not intend to enter the temple, but that he followed the others into the temple after passing through the security sensors. (Id.) Petitioner stated that Caratachea, Garcia, Gonzalez, and the others ransacked the temple and ordered the victims into the main temple. (Id. at A.3-A.4, cassette tape # 10) Petitioner stated that one of the monks recognized Gonzalez who told Petitioner to go outside to determine whether the walls were sound proof. (Id. at A.4) Petitioner claimed that the shooting occurred while he was outside. (Id.)

Investigators also interviewed Garcia who told investigators that Petitioner approached him with a plan to rob the temple and that Petitioner insisted that they leave "no witnesses." (Id.) Garcia further stated that Petitioner shot the victims. (Id.) Thereafter, investigators searched Garcia's home and found several items that were missing from the temple and

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[3] Citations to "cassette tape #" are to audio cassettes of Petitioner's interrogation on October 25, 1991.

a gun determined to have fired shotgun shells recovered from the scene. (Id. at A.4)

Based on the confessions and the evidence, the State arrested and charged Petitioner and Garcia with the Temple Murders and dismissed the charges against the Tucson Four. (Id. at A.4)

Following a juvenile transfer hearing, the court ordered that Petitioner and Garcia stand trial as adults.[4] (Id. at A.4-A.5) During the pretrial proceedings, both moved to suppress their confessions. (Id.) The trial court conducted a ten-day suppression hearing. (document # 7, Exh. A-L) The State presented eleven witnesses at the suppression hearing including the four officers who conducted the interrogation. The audiotapes of the interrogation and transcripts of the tapes were also introduced in evidence. (document # 7, Exh. B at 93-96) Petitioner did not testify. At the outset of the hearing, the court stated that it has listened to the cassette tapes of the interrogation. (document # 7, Exh. A at 6, Exh. B at 93) The court also noted that the transcripts of those tapes appeared accurate. (document # 7, Exh. A at 6; Exh. C at 26) The court denied the motions to suppress.

After the suppression hearing, Garcia entered a plea agreement pursuant to which he agreed to testify against Petitioner. (Id. at A.5) The state proceeded to trial against Petitioner and the jury convicted

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[4] The Honorable Gregory H. Martin presided over the proceedings in CR 92-01232 in the Superior Court of Arizona, Maricopa County.

Petitioner on nine counts of first degree murder and one count of burglary. (Id.) The trial court rejected the State's request for the death penalty, and sentenced Petitioner to nine consecutive life terms on the murder counts and eleven additional prison terms on the remaining counts. (Id. at A.5-A.6)

Petitioner appealed to the Arizona Court of Appeals raising five issues: (1) the trial court erred in failing to suppress his confession; (2) the trial court erred in restricting the nature of the testimony Petitioner could elicit from the Tucson Four; (3) the trial court erred in restricting Petitioner's cross-examination of Garcia; (4) the trial court erred in permitting Caratachea to invoke his right to remain silent; and (5) the trial court erred in excluding James Herron's testimony. (Respondents' Exhs. ZZ, AAA, BBB)

The Arizona Court of Appeals affirmed the convictions and sentences. (Appendix to document # 2 at A.35) The Arizona Supreme Court denied review on January 14, 1997 and the United States Supreme Court denied certiorari on June 16, 1997. Doody v. Arizona, 520 U.S. 1275 (1997). Thereafter, Petitioner filed the pending Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254. (document # 1)

STANDARD OF REVIEW

On April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L.No. 104-132, 110 Stat. 1214 was signed into law. Because Petitioner filed his petition after the effective

date of the AEDPA, it applies to this proceeding. See, Benn v. Lambert, 283 F.3d 1040, 1051 (9th Cir. 2002).

The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas retrials and to ensure that state-court convictions are given effect to the extent possible under the law." Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 1849 (2002)(citing Williams v. Taylor, 529 U.S. 362, 403-04 (2000)). Congress enacted the AEDPA "to restrict the availability of habeas corpus relief." Greenawalt v. Stewart, 105 F.3d 1268, 1275 (9th Cir. 1997). Section 2254(d) creates a "highly deferential standard for evaluating state-court rulings." Lindh v. Murphy, 521 U.S. 320, 334 n. 7 (1997). Under the AEDPA, a state prisoner is not entitled to habeas relief with respect to any claim that was adjudicated on the merits in state court unless adjudication of the claim:

> (1) resulted in a decision that was *contrary to*, or involved an *unreasonable application* of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an *unreasonable determination* of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d)(emphasis added).

The Supreme Court has considered the "contrary to" and "unreasonable application" clauses of section

(1) and found that they have independent meanings.

> A federal habeas court may issued the writ under the "*contrary to*" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court may grant relief under the "*unreasonable application*" clause if the state court correctly identifies the governing legal principles from our decisions but unreasonably applies it to the fact of the particular case. The focus on the latter inquiry is on whether the state court's application of clearly established federal law is *objectively unreasonable*, and we stressed in Williams that an unreasonable application is different from an incorrect one.

Bell, 122 S.Ct. at 1850 (internal citations omitted)(emphasis added). The federal habeas court may not "substitute its own judgment for that of the state court" and grant habeas relief based solely on an incorrect application of federal law; rather, the application of federal law must also be objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 1174 (2003)(stating that the "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous, rather it must be objectively unreasonable.) Woodford v. Visciotti, 537 U.S. 19, 123 S.Ct. 357, 361 (2002)("The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is

objectively unreasonable.")

In determining whether the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law," the phrase "Federal law" refers to United States Supreme Court precedent. Ramdass v. Angelone, 530 U.S. 156, 165-66 (2000); Williams, 529 U.S. at 403-04. Thus, circuit court case law "may be persuasive authority for purpose of determining whether a particular state court decision is an "unreasonable application" of Supreme Court law, and also may help [courts] determine what law is "clearly established." Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999)(citing MacFarlane v. Walter, 179 F.3d 1131, 1139 (9th Cir. 1999).

In evaluating the state court decision, federal courts must not "mischaracterize[e] the state court opinion" or record, and must defer to "the presumption that state courts know and follow the law." Visciotti, 123 S.Ct. at 3690-61(reversing the Ninth Circuit's granting habeas relief, finding the state court opinion rejecting a claim of ineffective assistance of counsel was not contrary to or an unreasonable application of federal law.) If the state court neither explains its ruling on the merits nor cites Unites States Supreme Court precedent, the district court must still rely on U.s. Supreme Court law to decide whether the state court reasonably applied federal law. Early v. Packer, 537 U.S. 3, 8, 123 S.Ct. 362, 365 (2002). The Supreme Court has held that citation to federal law is not required and that compliance with the habeas statute "does not even require *awareness* of our cases, so long

as neither the reasoning nor the result of the state-court decision contradicts them." Id. (emphasis in original)

With respect to the "unreasonable determination of the facts" prong, the Supreme Court has stated that "factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, 28 U.S.C. § 2254(c)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding. . . ." Miller El v. Cockrel, 537 U.S. 322, 123 S.Ct. 1029, 1041 (2003); See Torres v. Prunty, 223 F.3d 1103, 1108 (9th Cir. 2000)(stating that the standards governing reasonableness under § 2254(d)(2) are the same for unreasonableness under § 2254(d)(1).

Petitioner bears the burden of establishing that his detention violates the U.S. Constitution or laws of the United States. 28 U.S.C. § 2254(e)(1). A presumption of correctness applies to the states courts' factual determinations, and credibility determinations. Bragg, 242 F.3d at 1087 (citing Sumner v. Mata, 449 U.S. 539, 546-47 (1981)). In attempting to establish his claims for habeas relief, a state prisoner is limited to the factual assertions made in state court in support of properly exhausted claims, and he may not alter or expand those assertions in federal court. See, Baja v. Ducharme, 187 F.3d 10975, 1079 (9th Cir. 1999)(rejecting a claim that the prisoner was entitled to an evidentiary hearing: "State law not only permitted but required [the prisoner] to come forward

with affidavits or other evidence, to the extent that his claim relied on evidence outside the trial record.")

Where the AEDPA standards have been met, to grant relief under § 2254(d)(1), the District Court must also find that the state court's error was actually prejudicial — the error must have "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637-38 (2001)("Because this case involves a petition for writ of habeas corpus, and because the improper jury instruction was a trial-type error, Brecht . . . controls."); Bains v. Camra, 204 F.3d 964, 977 (9th Cir.2000)("we now join the vast majority of our sister circuits by deciding that the Brecht standard should apply uniformly in all federal habeas corpus cases under [28 U.S.C. §] 2254"). This is true even if the state court did not conduct a harmless error analysis. Bains, 204 F.3d at 977-78.

In addition to the foregoing, 28 U.S.C. § 2254(b)(1), still requires a petitioner to exhaust his state court remedies before seeking federal review:

> An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that:
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

The Court, however, may deny a petition on the merits event though it contains unexhausted claims. 28 U.S.C. § 2254(b)(2). The Court will address the issue of exhaustion below before addressing the merits of Petitioner's claims.

EXHAUSTION AND PROCEDURAL DEFAULT

Under 28 U.S.C. § 2254(b)(1), a state prisoner must exhaust available state court remedies before the federal court will consider a habeas corpus petition. 28 U.S.C. 2254(b) (stating that a state prisoner must present all claims on direct or collateral appeal in state court proceedings before a federal court will consider a habeas corpus petition); Rose v. Lundy, 455 U.S. 509 (1982); Lindquist v. Gardner, 770 F.2d 876, 877 (9th Cir. 1985). To properly exhaust state remedies, a prisoner must "fairly present" his claims to the appropriate state courts in a procedurally proper manner. Swoopes v. Sublett, 196 F.3d 1008, 1009-10 (9th Cir. 1999); Middleton v. Cupp, 7i68 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986); McQuown v. McCartney, 795 F.2d 807, 809 (9th Cir. 1986). A claim is fairly presented if the prisoner has described the operative facts and legal theories upon which the claim is based. Picard v. Connor, 404 U.S. 270, 277-78 (1971). It is not sufficient that all the facts necessary to support the federal claim were before the state courts or that a "somewhat similar" state law claim was made. Duncan v. Henry, 513 U.S. 364, 366 (1995). Rather, the prisoner "must specifically indicate

to [the state] court that those claims were based on federal law." Lyons v. Crawford, 232 F.3d 666 668 (9th Cir. 2000). "The petitioner must make the federal basis of the claim explicit either by citing federal law or the decisions of the federal courts, even if the federal basis is 'self-evident.'..." Id.

New factual allegations render a claim unexhausted when they fundamentally alter the legal claim considered by the state court. Vasquez v. Hillery, 474 U.S. 254, 26i0 (1986). Federal courts should not "entertain new evidence that places [a] claim in a significantly different posture, when that evidence was never presented to the state courts." Nevius v. Sumner, 852 F.2d 463, 470 (9th Cir. 1988).

If a petition seeking federal habeas corpus relief failed to fairly present his claims to the state court in a procedurally appropriate manner, the claim is procedurally defaulted and barred from federal review. Ylst v. Nunnemaker, 501 U.S. 797, 802-05 (1991). There are two types of procedural default. First, a state court may have expressly applied a procedural bar when the prisoner attempted to raise the claim in state court. Ylst, 501 U.S. at 802-05. If a state court applies a procedural bar such as waiver or preclusion, but proceeds to alternatively address the merits of the federal claim, the claim remains barred from federal review. Ylst, 501 U.S. at 802-05. A later "silent" denial of review affirms the lower court's application of a procedural bar. Ylst, 501 U.S. at 803.

Second, a prisoner may not have presented the claim in state court, but pursuant to the state court's

procedural rules, a return to state court would be futile. See, Teague v. Lane, 489 U.S. 288, 297-99 (1989).

Where petitioner has procedurally defaulted a claim, federal habeas review is only available if the prisoner establish "cause" for the procedural default and "actual prejudice" from the alleged constitutional error, or establishes a "fundamental miscarriage of justice." To establish cause, a petitioner must demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rules." Coleman, 501 U.S. at 753. "Prejudice" is actual harm resulting from the alleged constitutional error. Murray v. Carrier, 477 U.S. 478, 494 (1986). A prisoner must demonstrate that the alleged constitutional violation "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982).

Under the fundamental miscarriage of justice exception, a prisoner must establish that he is actually innocent of the crime. Actual innocence means that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995). To establish the requisite probability the "petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id.

In this case, Petitioner presented the claims raised in his pending § 2254 Petition to the Arizona

Court of Appeals, the Arizona Supreme Court, and the Supreme Court of the United States. Petitioner, therefore, has exhausted his claims. Although Petitioner presented his claims to the state court, they may still be procedurally barred if his claims were not presented in a procedurally appropriate manner. Here, Respondents assert that Petitioner procedurally defaulted his third claim challenging the exclusion of evidence regarding the "Tucson Four."

I. Whether Petitioner Procedurally Defaulted Claim Three

In his third claim, Petitioner argues that the trial court violated the due process clause by excluding testimony from the Tucson Four which Petitioner claims was "relevant to establish the truth or falsity of [Petitioner's] confession." (document # 2 at A.21) Petitioner bases this claim on the trial court's ruling that Petitioner could offer evidence of the Tucson Four confessions only for their truth in support of a defense theory that the Tucson Four, not Petitioner, committed the Temple Murders. Respondents argue that this claim is procedurally barred because the state court denied it on the basis of an independent state law pursuant to which the claim was procedurally barred. To determine whether Petitioner's claim is procedurally barred, the Court looks to the Arizona court of Appeals' opinion because it is the last reasoned state court opinion. See, Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)(explaining that where the last reasoned opinion of a state court rests on state procedural default, later decisions presumably rest on the same ground.)

On appeal, Petitioner argued that, absent the trial court's ruling, he would have "presented evidence of improprieties in the Tucson Four interrogations and could have proved and argued that his own confession, which he attributes to the 'same police officers using many of the same interrogation techniques,' was false, as were the Tucson Four confessions." (Id. at A.17) The Court of Appeals found that Petitioner's "argument on appeal, that testimony and confessions by the Tucson Four were admissible to show that Petitioner's confession was involuntary, however, is not only different from, but also inconsistent with the basis on which [Petitioner] urged their admissibility at trial." (Id. at A.17-18) Accordingly, relying on State v. Serna, 163 Ariz. 26i0, 267, 787 P.2d 1056, 1063 (Ariz. 1990), the Court of Appeals concluded that Petitioner's due process claim was procedurally barred because Petitioner may not assert an evidentiary theory for the first time on appeal. (Id.)

The Court of Appeals explained that:

> The question whether [Petitioner] could use the Tucson Four confessions first arose in the context of a motion in limine through which the state sought to preclude the defense from using statements by the Tucson Four. The state . . . argued that the Tucson Four statements should be excluded as unreliable and irrelevant. In response, [Petitioner] asserted that the statements were relevant to his defense that the Tucson Four, not [Petitioner], committed the Temple Murders and that a reasonable person

> could believe their confessions to be true. [Petitioner] gave no indication whatever that he intended to use the statements to establish that, because the Tucson Four confessions were not reliable, [Petitioner's] admissions also were not reliable.

(Id. at A.18)

The Court of Appeals further noted that, at a later point in the proceedings when the trial court was discussing the Tucson Four testimony with defense counsel, "[a]s had been true during earlier proceedings, [Petitioner] did not assert any intention of drawing parallels between the Tucson Four and [Petitioner's] interrogations." (document # 2 at A.19) Finally, the Court of Appeals concluded that:

> [Petitioner's] averments to the court that he intended to present the Tucson Four evidence to establish the truth of their confessions, his failure to offer the Tucson Four evidence for the purpose of proving the falsity of his confession, and his failure to define which similarities he regarded as providing sufficient basis for comparing the confessions, lead us to conclude that [Petitioner] waived this argument on appeal.

(document # 2 at A.22)

In the pending Petition, Petitioner argues that, contrary to the Court of Appeals' finding, his due process claim based on the trial court's evidentiary

ruling is not procedurally barred because: (1) the Court of Appeals' decision dose not rest on an "adequate and independent" state law ground; and (2) the record does not support the Court of Appeals' decision. The Court will address these arguments in turn.

A. Adequate and Independent State Ground

1. Legal Doctrine

Pursuant to the independent and adequate state ground doctrine a federal court is precluded from reaching a state prisoner's habeas corpus claim when a state-law default prevented the state court from considering the merits of that claim. Thomas v. Lewis, 945 F.2d 1119, 1122 (9th Cir. 1991)(citing Ylst v. Nunnemaker, 501 U.S. 797 (1991); Wainwright v. Sykes, 433 U.S. 7i2, 87-88 (1977).

To assist courts in determining whether a state court decision rests on an adequate and independent state ground, the Supreme Court developed the following presumption:

> federal courts on habeas corpus review of state prisoner claims are to presume that there is no independent and adequate state ground for a state decision when the decision fairly appears to rest primarily on a federal law unless the state court's opinion contains a 'plain statement' that its decision rests upon independent and adequate state grounds.

Thomas, 945 F.2d at 1122 (finding that state court

decision rested on an adequate and independent state ground where, although the state court addressed petitioner's claims on the merits, the court prefaced its discussion with a statement that petitioner had waived all of his claims and indicated that it addressed the merits only as an "alternative" basis for its decision)(citing Michigan v. Long, 463 U.S. 1032, 1040-41 (1983); Harris v. Reed, 489 U.S. 255 (1989)). See also, Coleman v. Thompson, 501 U.S. 722, 735 (1991)(finding that state court's decision rested on an independent and adequate state ground where state court dismissed petitioner's claims based on his failure to comply with the State Supreme Court's procedural rules.) This presumption applies only "where a federal court has good reason to question whether there is an independent and adequate state ground for the decision. . . ." Coleman, 501 U.S. at 739. The Supreme Court explained that "[t]here is . . . little that the federal courts will gain by applying a presumption of federal review in those cases where the relevant state court decision does not fairly appear to rest primarily on federal law or to be interwoven with such law, and much that the State and State courts will lose." Id. at 740.

To further assist courts in applying the "independent and adequate" state law doctrine, the Court has clarified that:

> [w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion 'fairly appear[s] to

> rest primarily upon federal law, (citation omitted) we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly, where . . . the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.

Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

As discussed below, the Court concludes that the Arizona Court of Appeals' decision rests on an adequate and independent state ground, and therefore, review of Petitioner's due process claim is procedurally barred unless he can establish cause and prejudice or a fundamental miscarriage of justice.

2. Analysis

Here, although the Arizona Court of Appeals alternatively addressed the merits of Petitioner's due process claim, it relied on the procedural bar as an independent basis for rejecting Petitioner's claim.

First, in addressing Petitioner's due process claim, the Court of Appeals noted that Petitioner's argument on appeal was not only different from, but was also inconsistent with, his argument at trial that the confessions of the Tucson Four established that the Tucson Four, not Petitioner, committed the Temple Murders. (document # 2 at A.17) The Court of Appeals

then stated that "[b]ecause a party may not assert an evidentiary theory for the first time on appeal, State v. Serna, 163 Ariz. 260, 787 P.2d 1056i, 1063 (Ariz. 1990), we reject this claim." (Id. at A.18) In reaching this conclusion, the Court of Appeals emphasized that on two separate occasions when the Court discussed with counsel the purposes for which Petitioner could offer the testimony of the Tucson Four at trial, Petitioner failed to "assert any intention of drawing parallels between the Tucson Four and [Petitioner's] interrogation." (document # 2 at A.19, A.18)

Only after finding that Petitioner had waived his due process claim did the Court of Appeals address the merits of Petitioner's claim that "the trial court, by foreclosing an argument that his confession, like those of the Tucson Four, was false, violated the principles set forth in Crane v. Kentucky, 476 U.S. 683 (1986)." (document # 2 at A.20) The Court of Appeals concluded that Petitioner's claim failed on the merits because Crane did not apply. (Id.)

After addressing the merits of Petitioner's claim, the Court of Appeals reiterated that "Petitioner failed to preserve for appeal the issue of whether the trial court should have admitted the Tucson Four evidence as relevant to establish the truth or falsity of [Petitioner's] confession." (document # 2 at A.21) Finally, the Court of Appeals concluded that {Petitioner "waived this argument on appeal." (Id. at A.22)

Although the Arizona Court of Appeals briefly discussed the merits of Petitioner's federal due process

claim as an alternative basis for denying the claim, its decision does not "fairly appear to rest primarily on a federal law." Rather, the Court of Appeals specifically relied on a state procedural rule in rejecting Petitioner's due process claim. "The fact that the court went on to discuss the lack of merit of [Petitioner's claim] does not eliminate the procedural bar." Harris v. Reed, 489 U.S. 255, 264 n. 10 (1989). See also, Coleman, 501 U.S. at 735 (finding that state court's decision rested on an independent and adequate state law ground where state court dismissed petitioner's claims based on his failure to comply with the State Supreme Court's procedural rules); Poland v. Stewart, 169 F.3d 573, 586-87 (9th Cir. 1998)(finding that trial court's decision that petitioner's claim was waived under Ariz.R.CrimP. 32.2(a)(3) constituted an adequate and independent ground sufficient to bar federal review despite the fact that the court also found that petitioner's claim lacked merit); Thomas v. Lewis, 945 F.2d 1119, 1122-23 (9th Cir. 1991)(finding that state court decision rested on an adequate and independent state law ground where, although state court addressed petitioner's claims on the merits, the court prefaced its discussion with a statement that petitioner had waived all of his claims and indicated that it addressed the merits only as an "alternative" basis for it decision).

Based on the foregoing, the Court finds that Petitioner procedurally defaulted his claim that the trial court violated due process by prohibiting Petitioner from arguing to the jury that, if the jury concluded that the Tucson Four confessions were false and unreliable, the jury could likewise infer that

Petitioner's confession was false and unreliable.

B. Support for Court of Appeals' Decision

In the alternative, Petitioner argues that the record does not support the State court's finding that Petitioner waived his due process claim. The Court of Appeals' decision that Petitioner waived his challenge to the trial court's evidentiary ruling is based on the Court of Appeals' interpretation of state law as set forth in State v. Serna, 163 Ariz. 260 (Ariz. 1990). As discussed in Section II. A, *supra*, the record supports the State court's determination that Petitioner waived his due process claim. Because Petitioner procedurally defaulted his due process claim in state court pursuant to an adequate and independent state rule, the Court should not reach the merits of that claim unless Petitioner establishes either cause and prejudice as a result of the alleged violation of federal law, or that failure to review his claim will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 748.

II. Bases for Overcoming Procedural Bar

Petitioner may overcome the procedural bar if he establishes "cause and prejudice" or a "fundamental miscarriage of justice."

A. Cause and Prejudice

"'Cause' is the legitimate excuse for default; 'prejudice' is the actual harm resulting from the alleged constitutional violation." Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir. 1984). If

petitioner fails to establish cause for his procedural default, the court need not consider whether petitioner has shown actual prejudice resulting from the constitutional violation. Smith v. Murray, 477 U.S. 527, 533 (1986). "Cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from construction or raising the claim." Murray v. Carrier, 477 U.S. 478, 488 (1986).

In an attempt to establish cause, Petitioner argues that trial counsel believed that he had made a sufficient objection to the trial court's ruling regarding the Tucson Four testimony. (document # 9 at 10-11) At most, Petitioner asserts *attorney error* as cause for his procedural default. Although ineffective assistance of counsel may constitute cause to excuse procedural default, "*attorney error* short of ineffective assistance does not constitute cause." *Murray*, 477 U.S. at 492 (emphasis added). Likewise, "[a]ttorney inadvertence or ignorance of the law does not establish cause for procedural default." Vansickel v. White, 166 F.3d 953, 958 (9th Cir. 1999). Accordingly, Petitioner cannot establish cause for his procedural default.

B. Fundamental Miscarriage of Justice

Although Petitioner fails to establish cause and prejudice, he could overcome the procedural bar by establishing that failure to consider his due process claim would result in a fundamental miscarriage of justice. The circumstances constituting a fundamental miscarriage of justice are extremely "narrow" and apply only to "extraordinary case[s]." Schlup v. Delo,

115 S.Ct. 851, 860-61, 864 (1995); see, Murray v. Carrier, 477 U.S. at 495-96. Accordingly, the Supreme Court has "explicitly tied the miscarriage of justice exception to the petitioner's innocence." Schlup, 115 S.Ct. at 864. After review of the record, the Court cannot conclude that failure to consider the merits of Petitioner's due process claim would result in a fundamental miscarriage of justice. Because Petitioner has neither established cause and prejudice nor a fundamental miscarriage of justice to excuse his procedural default, federal habeas review is barred. However, in an abundance of caution, the Court will address the merits of Petitioner's due process claim in section III of the Analysis section below.

ANALYSIS OF PETITIONER'S CLAIMS

As previously stated, to prevail on a writ of habeas corpus, Petitioner must establish that the state decision is contrary to federal law or that the state decision rests on an unreasonable application of federal law or an unreasonable determination of the facts in view of the evidence presented. 28 U.S.C. § 2254(d). The Court will consider Petitioner's claims under this standard.

I. Claim One: Whether Police Violated Petitioner's Miranda Rights

In his first claim, Petitioner argues that his "conviction is constitutionally defective because it rests on a confession obtained in violation of his rights under Miranda v. Arizona, 384 U.S. 436 (1966)." (document # 2 at 16) In support of this claim, Petitioner argues

that "[t]he warnings given to [Petitioner] . . . did not satisfy Miranda's mandate . . . [because] the officers used language which was calculated to—and which did—obscure and downplay the importance of what [Petitioner] was being told." (document # 2 at 18) In opposition, Respondents assert that Petitioner's claim fails because he cannot establish that the state court's decision rests on an unreasonable application of federal law or an unreasonable determination of the facts. (document # 7 at 16)

A. Clearly Established Federal Law

In Miranda v. Arizona, the Supreme Court developed "procedural safeguards" to protect the Fifth Amendment privilege against self incrimination when an individual is taken into custody or otherwise deprived of his liberty. 384 U.S. 436, 478 (1966).[5] Specifically, the Miranda Court held that, before questioning, an individual must be warned "that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Id. at 479. The Miranda Court explained that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant." 384 U.S. at 476

[5] For purposes of this discussion, the Court assumes without deciding that Petitioner was "in custody" for purposes of Miranda during the relevant period.

(emphasis added). Thus, Miranda, does not require a "talismanic incantation to satisfy its strictures." California v. Prysock, 453 U.S. 355, 360 (1981). "Reviewing courts, therefore, need not examine Miranda warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.'" Duckworth v. Eagan, 492 U.S. 195, 203 (1989)(quoting Prysock, 453 U.S. at 361).

B. Analysis of Miranda Claim

Here, Petitioner argues that the warnings which police gave him before questioning fail to satisfy Miranda because "the officers used language which was calculated to — and which did — obscure and downplay the importance of what [Petitioner] was being told." (document # 2 at 18) In support of his claim, Petitioner cites the following statements which police made while reading Petitioner his Miranda rights:

> They call it rights on t.v., okay. What, what that is and basically all that is Jonathan is, it's not necessarily something that is, like on t.v. where they portray it when somebody's ah guilty of doing something, ah, we read these things to people on somewhat of a regular basis, whether they're responsible for doing something or not, okay. So I don't want you to feel that because I'm reading this to you that we necessarily that you're responsible for anything. It's for your

> benefit, it's for your protection and for ours as well, okay?

(document # 2 at 19)(citing document # 2 at A.42) Petitioner also cites the following statements as evidence that police downplayed the importance of the warnings are "to save time," "to get you back to what you need to do," to "get things squared away," and the warnings are "for your benefit and for our benefit." (document # 2 at 18)(citing document # 2 at A.40, A.41, A.47) Finally, Petitioner claims that police "blatantly misadvised" him of his right to counsel and cites the following portion of the warnings in support of his claim:

> [A]n attorney is a lawyer who will speak for you and help you concerning the crime or any kind of offense that . . . we might think that you or somebody else is involved in, if you were involved in it, okay. Again, it (sic) not necessarily means that you were involved, but if you were, then that's what that would apply to okay.

(document #2 at 20)(citing document # 2 at A.49)

Petitioner presented this claim to the Arizona Court of Appeals. (document # 2 at A.14-A.17) The Court of Appeals "accept[ed] [Petitioner's] characterization of the questioning as custodial interrogation requiring Miranda warnings." (document # 2 at A.16) The Court of Appeals then concluded that "the officers advised [Petitioner] of his Miranda rights in a clear and understandable manner and that

[Petitioner] made a knowing and intelligent waiver." (Id. at A.16) The Court of Appeals determined that the officers: (1) advised Petitioner of his right to have a parent or guardian present, (2) advised Petitioner that he could be tried as an adult, (3) read Petitioner Miranda rights from a standard juvenile form and provided explanations where appropriate, and (4) after reading each warning, asked Petitioner if he understood the right involved and obtained his initials on the form. (Id.) The Court of Appeals found that the officers explained Petitioner's Miranda rights in a manner appropriate for Petitioner's age, intelligence, and experience with the justice system. (document # 2 at A.17) The Court agrees and finds that the Court of Appeals' decision comports with federal law and is not an objectively unreasonable determination of the facts or application of federal law. See, 28 U.S.C. § 2254(d).

As previously stated, Miranda does not require a verbatim reading of the warnings set forth in that decision. Rather, Miranda mandates that, before custodial interrogation, police give warnings sufficient to convey the core rights which Miranda guarantees. See, 384 U.S. at 476. Here, before reading Petitioner his Miranda rights from a standard juvenile form, police inquired as to Petitioner's educational background as well as his school and community activities to establish Petitioner's ability to understand his rights. (Respondents' Exh. B at 80-85) In response to the investigator's questions, Petitioner informed police that he was in the eleventh grade, maintained a "B" average, was in charge of the R.O.T.C. Honor Guard and the R.O.T.C. Color Guard, had worked at McDonald's in the past, and was presently employed at

the commissary at Luke Air Force Base. (Respondents' Exh. B at 80-85) After assessing Petitioner's ability to comprehend the warnings, police read Petitioner the following warnings: (1) "you have the right to remain silent," (2) "[a]nything you say can and will be used against you in a court of law," (3) "you have the right to have an attorney present prior to and during questioning," and (4) "if you cannot afford an attorney, you'd have the right to have one appointed for you prior to questioning." (document # 2 at A.49) Police also inquired whether Petitioner wanted a parent or guardian present. (Id. at A.50)

Although police did not read Petitioner Miranda warnings in the precise form in which they appear in that decision, the warnings were a "fully effective equivalent" because they conveyed the essential rights prescribed in Miranda, 384 U.S. at 476. Police specifically advised Petitioner of his right to have counsel present both before and during questioning and, contrary to Petitioner's assertion, the officer's subsequent comment that Petitioner was entitled to counsel if he was "involved" did not negate the warning. See, Duckworth v. Eagan, 492 U.S. 195, 203-205 (1989)(holding that advising an accused that an attorney would be appointed "if and when you go to court" did not render Miranda warnings inadequate where police also advised petitioner of his right to have counsel both before and during questioning.) Likewise, the fact that police interspersed the warnings with explanations thereof did not dilute the warnings. After review of the record, the undersigned concludes that the record supports the Court of Appeals' decision that the warnings which police read to Petitioner before

questioning satisfied Miranda. Petitioner has not established that the State court decision is either contrary to federal law or rests on an unreasonable application of federal law or an unreasonable determination of the facts. See, 28 U.S.C. § 2254(d). Accordingly, his claim based on the Miranda warnings fails.[6]

II. Claim Two: Voluntariness of Petitioner's Confession/Due Process Claim

In his second claim, Petitioner contends that his confession was involuntary under the "totality of the circumstances" test. In response, Respondents argue that Petitioner's voluntariness claims fails because he cannot establish that the state courts' rejection of this claim is contrary to federal law or that it rests on an unreasonable application of federal law or an unreasonable determination of the facts. See, 28 U.S.C. § 2254(d)

In an initial matter, the Court notes that Petitioner contends that his voluntariness claim should not be analyzed under the AEDPA's deferential standard of review. (Supp. Memo. At 22-24[7]). The Court disagrees. Before the AEDPA, federal courts

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[6] In a Supplemental Memorandum (document # 24), Petitioner urges the court to consider an Eleventh Circuit opinion in Hart v. Attorney General of State of Florida, 323 F.3d 884 (11th Cir. 2003). Hart is not binding on this Court because it is neither Supreme Court precedent nor is it the Ninth Circuit's application of such law.

[7] Citations to "Supp. Memo." are to Petitioner's May 19, 2003 Supplemental Memorandum of Law, document # 24.

reviewed de novo a state court's finding that a habeas corpus petitioner's statements were voluntary. Courts, nonetheless, presume correct all underlying historical or subsidiary factual findings. Miller, 474 U.S. at 112-13. Under the AEDPA, however, federal courts must grant substantial deference to a state court's voluntariness determinations. See, Williams, 529 U.S. at 407. Federal courts that have considered this issue have held that state court rulings on voluntariness are entitled to deference under 28 U.S.C. § 2254(d)(1). See, Trice v. Ward, 196 F.3d 1151, 1169 (10th Cir. 1999)(finding that state voluntariness conclusion not contrary to United States Supreme Court precedent); Garvin v. Farmon, 80 F.Supp.2d 1082 (N.D. Cal. 1999)(same). Additionally, in several cases, where lower federal courts have failed to give the proper deference which the AEDPA requires, the Supreme Court has reversed the decision. For example, in Price v. Vincent, ___ U.S. ___, 123 S.Ct. 1848 (2003), he Court stated, with regard to a double jeopardy claim, that, "[a]lthough the Court of Appeals recited the [AEDPA] standard, . . . it proceeded to evaluate the claim de novo rather than through the lens of § 2254(d), apparently because it [viewed the issue] as a question of law and not one of fact." Id. at 1852. The Supreme Court found that contrary to the federal court's conclusion, the state court's decision was not contrary to, or an unreasonable application of, clearly established federal law. Id. at 1854. The Price Court concluded, "[e]ven if we agreed with the Court of Appeals that the Double Jeopardy Clause should be read to prevent continued prosecution of a defendant under these circumstances, it was at least reasonable for the state court to conclude otherwise." Id. at 1854-

1855.

In view of the foregoing, the Court finds that it must apply the AEDPA standard, which is a deferential standard, in analyzing Petitioner's claims. Below, the Court will analyze Petitioner's claims under subsections (d)(1) and (d)(2) of § 2254.

A. "Clearly Established Federal Law" Applicable to Voluntariness Claim

As previously stated, under the AEDPA, a state prisoner is not entitled to habeas relief with respect to any clam that was adjudicated on the merits in state court unless adjudication of the claim:

> (1) resulted in a decision that was *contrary to*, or involved an *unreasonable application of, clearly established Federal law*, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an *unreasonable determination of the facts* in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d)(emphasis added). Before determining whether the state court's decision was "contrary to" or involved an "unreasonable application" of federal law, the Court must identify the clearly established federal law regarding the voluntariness of confessions. See, 28 U.S.C. § 2254(d)(1). As used in § 2254(d)(1), the phrase "Federal law" refers exclusively to United States

Supreme Court precedent. Ramdass v. Angelone, 530 U.S. 156, 165-66 (2000); Williams, 529 U.S. at 403-04. the Court finds that the relevant Supreme Court precedent regarding voluntariness includes the following cases cited by Petitioner and Respondents: Withrow v. Williams, 507 U.S. 680, 688 (1993); Colorado v. Connelly, 479 U.S. 157 (1985), Fare v. Michael C., 442 U.S. 707 (1979); Mincey v. Arizona, 437 U.S. 385 (1978); In re Gault, 387 U.S. 1 (1967); and Gallegos v. Colorado, 370 U.S. 49 (1962). The Court will rely on these cases to set forth the clearly established federal law applicable in this case.

Involuntary confessions are not admissible in evidence. Dickerson v. United States, 530 U.S. 428 (2000)(stating that "we . . . continue to exclude confessions that were involuntary"); Mincey, 437 U.S. at 398. Since Connelly, the Supreme Court has found that coercive police conduct is a necessary prerequisite to a conclusion that a confession is involuntary, and the defendant must establish a causal link between the coercive conduct and the confession. Connelly, 479 U.S. at 165.

To determine whether a confession was involuntary in violation of the due process clause, courts employ the "totality-of-the-circumstances" test. Withrow v. Williams, 507 U.S. 680, 688 (1993).

> Under this approach, [the court] examine[s] the totality of the circumstances to determine whether a confession has been made 'freely, voluntarily and without compulsion or inducement of any sort.'

Withrow, 507 U.S. at 688-89 (quoting Haynes v. Washington, 373 U.S. 503 (1963)).

The "totality of the circumstance" includes "both the characteristics of the accused and the details of the interrogation." Dickerson, 530 U.S. at 434 (quoting Schneckloth v. Bustamante, 412 U.S. 218, 226 (1973)).

With regard to the confessions of minors, the Supreme Court has stated that:

> The greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

In re Gault, 387 U.S. 1, 55 (1967). However, the Supreme Court has not formulated a specific test for analyzing the confessions of minors. Rather, a juvenile's confession is analyzed under the "totality of the circumstances" where one of the circumstances is the individual's status as a juvenile. United States v. Doe, 155 F.3d 1070, 1073 (9th Cir. 1998)(citing Fare v. Michael C., 442 U.S. 707, 725 (1979)); Gallegos, 370 U.S. at 55 ("There is no guide to the decision of cases [involving the confession of a minor] except the totality of the circumstances."). The totality approach "mandates inquiry into al the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence . . . . " Michael C., 442 U.S. at 725. See, United States v. Haswood, 2003 WL

22833048 (9th Cir., December 1, 2003)(citing Schneckloth v. Bustamante, 412 U.S. 218 (1973))(stating that there is no talismanic definition of voluntariness. Rather, courts consider the following factors: age of the accused, intelligence, advice of constitutional rights, length of interrogation, repeated and prolonged nature of questioning, and the use of physical punishment.)

Having identified the "clearly established federal law," the Court will determine whether the state court decisions are "contrary to" or involve an "unreasonable application" of federal law. See, 28 U.S.C. § 2254(d)(1).

B. Whether State Court Decision is "Contrary to" Federal Law

As an initial matter, Petitioner contends that the state courts reached a conclusion that is "contrary to" clearly established federal law under § 2254(d). A decision is "contrary" to clearly established federal law if (1) it fails to apply the correct controlling authority, or (2) it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result. Bell v. Cone, 535 U.S. 685 (2002).

1. Whether State Court applied Correct Controlling Authority

Petitioner first challenges the standard of review which the State courts applied to Petitioner's case. Petitioner next claims that the state court did

not apply the totality of the circumstances test. The Court will address these claims below.

a. Standard of Review applied by State Court

Petitioner contends that the Arizona Court of Appeals decision is "contrary to" federal law because the state court applied a rule different from the controlling law. Specifically, Petitioner challenges the appellate court's application of the "manifest error" or "abuse of discretion" standards on review of the voluntariness issue. (document # 24, Supp. Memo at 19, 24, 29) Review of Arizona law reveals that these standards are consistent with the controlling federal law.

With regard to these standards, the Arizona Supreme Court has explained that:

> The standard of review on admissibility of a defendant's statements has been deemed *clear and manifest error*. (citation omitted) We find little authority indicating quite how manifest an error must appear to be so clear as to require reversal. We thus find it much more helpful to think in terms of an *abuse of discretion* standard. Abuse of discretion was discussed at length in State v. Chapple. (citation omitted)
>
> '[T]he phrase [abuse of discretion] as a whole has been interpreted to apply where the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice. Similarly, a discretionary act

> which reaches an end or purpose not justified by, and clearly against, reason and evidence "is an abuse" . . . Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable consideration which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact on what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our own judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine the law and policy and it becomes our duty to 'look over the shoulder' of the trial judges and, if appropriate, substitute our judgment for his or hers.' (citation omitted)
>
> Clear and manifest error, whatever it may mean, is really shorthand for abuse of discretion, and that is the term we will use.

State v. Jones, 203 Ariz. 1, 4, 49 P.3d 273 (2002) (emphasis added)(quoting State v. Chapple, 35 Ariz. 281, 297 n. 18, 660 P.2d 1208 (1993)). As the Arizona Supreme Court explained, Arizona's "clear and manifest error" standard of review, which the appellate

court cited in this case, only means that the appellate court defers to the trial court's determination on factual issues. This standard is consistent with the AEDPA.

The following passage also illustrates that Arizona's standard of review regarding the voluntariness issue is consistent with clearly established federal law.

> But where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may be fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses but the legal duty is upon them to make the decision. (citation omitted)
>
> Review here deals with circumstances which require examination into the possibility as to whether the judge and jury in the trial court could *reasonably conclude* that the . . . confession was voluntary. The fact that there is evidence which would justify a contrary conclusion is immaterial. To triers of fact is left the determination of the truth or error of the testimony of the prisoners and officials alike.

Lyons v. State of Oklahoma, 322 U.S. 596, 602-03 (1944)(emphasis added). The Supreme Court has further stated that "where a question of fact may have constitutional significance, we normally accord

findings of state courts deference in reviewing constitutional claims here." Time, Inc. v. Firestone, 424 U.S. 448, 463 (1976). Because the standard of review applied by the Arizona appellate court is consistent with federal law, Petitioner's argument that the Arizona Court of Appeals applied an improper standard of review lacks merit.

b. Controlling Authority

Petitioner also contends that the state courts reached a conclusion that is "contrary to" clearly established federal law because the courts applied the incorrect controlling authority. Petitioner challenges the trial court's failure to mention the "totality-of-the-circumstances" test. (document # 24, Supp. App. At 36) the AEDPA, however, does not require citation to Supreme Court precedent – "indeed, it does not even require awareness of [the Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." Packer, 123 S.Ct. at 365. Although the trial court in this case did not explicitly cite the "totality-of-the-circumstances" test, it did cite the proper test under Connelly: "The issue appears to be whether the defendant's will to resist confessing was overborne by the law enforcement officials conducting the investigation." (document # 28, Exh. A at page 33); See, United States v. Miller, 984 F.2d 1028, 1031 (9th Cir. 1993)("The pivotal question in each case is whether the defendant's will was overborne when the defendant confessed.") See also, Amaya-Ruiz v. Stewart, 121 F.3d 486, 494-95 (9th Cir. 1997)(setting forth as the test: "whether, considering the totality of the circumstances, the government

obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne.")

Moreover, the trial court's consideration of various circumstances surrounding Petitioner's confession indicates that the trial court was aware of the "totality-of-the circumstances" test. (document # 28, Exh. A at page 30-33) Specifically, the trial court noted that it had "considered the time, duration, and location of the questioning, the fact that the Miranda warnings were given, and again, the defendant's youth, and inexperience with the criminal justice system." (Id. at 33)

Petitioner contends that the appellate court also failed to rely on the proper controlling authority. The Arizona Court of Appeals' opinion does not cite federal case law, however, it cites to State v. Jiminez, 165 Ariz. 444, 448-453, 799 P.2d 785, 789-90 (1990), an Arizona Supreme Court decision finding the confession of a 17 year old voluntary. (document # 28, Exh. B at 7) Jiminez in turn cites several Supreme Court cases, which this Court identified as the controlling authority in this case, including Connelly, In re Gault, Michael C., and Gallegos. See, 165 Ariz. at 448-453, 799 P.2d at 789-790. The appellate court also stated that, "[i]n assessing the voluntariness of a confession, we 'look to the totality of the circumstances surrounding the confession and determine whether the will of the defendant has been overborne." (document # 28, Exh. B at 7) The Arizona court of Appeals noted that the trial court had considered the factors set forth in Jiminez. (Id. at 8) The court then discussed

Petitioner's age, work experience, education, background, mental condition, capacity to understand the warnings and the consequences of waiving the warnings, and the time and duration of the interrogation. (Id.) Thus, the Arizona Court of Appeals applied the proper controlling authority.

Petitioner further contends that the appellate court failed to conduct in depth review. Contrary to Petitioner's assertion, the Arizona Court of Appeals opinion devotes eight pages to the voluntariness issue. (document # 28, Exh. B at 7-14) The appellate court also noted that it has listened to the audio tapes. (document # 28, Exh. B at 9)

Petitioner next complains that the state courts failed to set forth every factor of the "totality-of-the-circumstances" test in their decisions, and did not stat that they considered the factors individually and cumulatively. (document # 24, Supp. Memo at 29-31) The Supreme Court in Packer, however, said that the state courts do not need to make "a formulary statement that the trial court's actions and inactions were noncoercive "individually and cumulatively." 123 S.Ct. at 365 (discussing state appellate court's discussion of alleged coercion of a dissenting juror.) That the state appellate court considered the totality of the circumstances was "the fair import of the Court of Appeals' opinion." Id.

In view of the foregoing, the Court finds that both the trial court and the appellate court applied the correct "clearly-established federal law." See, 28 U.S.C. § 2254(d).

2. Whether State Court Properly Applied Clearly Established Federal Law

Petitioner next argues that the state court opinion is "contrary to" federal law under § 2254(d)(1) because the state courts applied the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reached a different result. See, Bell v. Cone, 535 U.S. 685 (2002); § 2254(d).

Specifically, Petitioner argues that his case was materially indistinguishable from Haley v. Ohio, 332 U.S. 596 (1948)(15-year-old's confession obtained after five hours of late night interrogation outside presence of his mother or an attorney was involuntary.); Gallegos v. Colorado, 370 U.S. 49 (1952)(holding 14 year old's confession involuntary and addressing need for friendly adult counsel); and Gault, 387 U.S. at 55, and therefore, the state court should have found Petitioner's confession involuntary.

Contrary to Petitioner's assertion, this case is distinguishable from the foregoing Supreme Court precedent. First, in Haley, the Court found that the confession of a 15-year-old after five hours of interrogation, which began at midnight, by police officers working in relays, without advising petitioner of his rights, and without advice of family or counsel was involuntary in violation of due process. 332 U.S.

at 598-601. Police arrested petitioner from his home in the middle of the night. In finding the confession involuntary, the Court noted that "[a]ge 15 is a tender and difficult age for a boy" and that a "15-year old lad" is in the early teen years." Id. at 599. The Court also found it significant that after petitioner confessed, he was "kept incommunicado for three days during which the lawyer retained to represent him twice tried to see him and twice was refused admission." Id. at 600. Similarly, petitioner's mother was not allowed to see him for over five days after his arrest. Id. The Court found that such behavior evidenced the "disregard of the standards of decency" and went on to state that "[w]hen the police are so unmindful of these basic standards of conduct in their public dealings, their secret treatment of a 15-year old boy behind closed doors in the dead of night becomes darkly suspicious." Id.

Unlike petitioner in Haley, Doody was advised of his Miranda rights, including his right to the presence of a parent or an attorney and he was 17 ½ as opposed to the "tender age" of 15. Additionally, there is no evidence that Petitioner was held "in communicado" after his confession or any other indication that police acted with "disregard of the standards of decency" as in Haley. Although the interrogation spanned the midnight hour, it commenced at 9:00 p.m. and Petitioner voluntarily accompanied police to the station unlike Haley who was taken from his family home in the middle of the night.

This case is also distinguishable from Gallegos where the Court held that the confession of a 14 year

old, who had been held for five days without officers sending for his parents or counsel, and without bringing him before a judge, was obtained in violation of due process. 370 U.S. at 50-55. There, the Court noted that after petitioner was arrested he was detained for five days in Juvenile Hall where he was kept in security. Although his mother tried to see him, she was refused permission. Id. at 50. The court found that "the five-day detention during which time the boy's mother unsuccessfully tried to see him and he was cut off from contact without any lawyer or adult advisor — gives this case an ominous cast." Id. at 54.

Unlike Gallegos, Petitioner was read his Miranda rights and asked whether the wanted a parent present and responded that he was indifferent. Additionally, Petitioner was 17 ½ as opposed to 14. Finally, Petitioner was not detained in "security" or isolated as was petitioner in Gallegos.

Finally, this matter is distinguishable from in re Gault where the confession was obtained without advising petitioner of his right to silence. 387 U.S. at 56. As previously stated, Doody was advised of his Miranda rights.

Finally, this case is distinguishable from Alvarado v. Hickman, 316 F.3d 841 (9th Cir. 2003), *cert. granted*, 2003 WL 21229273 (September 2003). The District Court referred this matter to the undersigned for review in light of Alvarado. Alvarado reaffirms the validity of the totality-of-the-circumstances test and reiterates the factors relevant in assessing the totality of the circumstances where confessions of minors are

concerned. In Alvarado, he court summarized the law as follows:

> Under the Supreme Court's due process jurisprudence, a criminal defendant's age has long been a relevant factor in determining whether a confession or a waiver of a constitutional right was voluntary. See, e.g. Withrow, 507 U.S. at 693, 113 S.Ct. 1745 (noting that a defendant's maturity is one of the factors used to determine if a defendant's confession was voluntary); Michael C., 42 U.S. at 725, 99 S.Ct. 2560 ("Where the age and experience of a juvenile indicate that his request for his probation officer or his parents, is in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination.") Schneckloth, 412 U.S. at 226, 93 S.Ct. 2041 (stating that determination whether consent to search a car was voluntary made is under the totality of the circumstances, including the 'youth of the accused'); In re Gault, 387 U.S. at 45, 87 S.Ct. 1428 ("This court has emphasized that admissions and confessions of juveniles require special caution."); Gallegos, 370 U.S. at 54, 82 S.Ct. 1209 (ruling under the totality of the circumstances that confession of 14-year old to charges of assault 'and robbery could not be 'compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions'); Haley, 332 U.S. at 599-601, 68 S.Ct. 302 (ruling that murder confession

> made by 15 year-old without consultation with counsel or parents 'cannot be judged by the more exacting standards of maturity' and that defendant's due process rights had thus been violated.

Alvarado, 316 F.3d at 848.

The court in Alvarado extended those principles to determine whether petitioner was "in custody." Alvarado was 17 years old when questioned at a sheriff's station for two hours. The court described him as an inexperienced youth with no prior criminal record. His parents were denied permission to be present. 316 F.3d at 844. On habeas review, the Ninth Circuit ruled that this was a custodial interrogation, that defendant's confession should not have been admitted into evidence, and that petitioner's state murder conviction must be vacated. Id.

The Court finds that this case is distinguishable from Alvarado because it involved a determination of whether petitioner was "in custody" which is not before this Court. Rather, the issue before the state court in this case was the voluntariness of Petitioner's confession. Moreover, Alvarado was decided based on an interpretation of the AEDPA set forth in Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir. 2000) which the Supreme Court rejected in Lockyer v. Andrade, 123 S.Ct. 1166 (2003). The Alvarado court's decision on the merits is not binding on this Court's determination of whether Petitioner's confession was voluntary.

In view of the foregoing discussion, the Court

cannot conclude that the state courts reached a decision that is "contrary to" clearly established federal law under § 2254(d).

C. Unreasonable Application of Federal Law

Petitioner further argues that the Arizona Court of Appeals decision involved an unreasonable application of federal law. A court may grant relief under the

> "unreasonable application" clause if the state court correctly identifies the the governing legal principles from our decisions but unreasonably applies it to the facts of the particular case. The focus on the latter inquiry is on whether the state court's application of clearly established federal law is *objectively unreasonable*, and we stressed in Williams that an unreasonable application is different from an incorrect one.

Bell, 122 S.Ct. at 1850 (internal citations omitted) (emphasis added). The federal habeas court may not "substitute its own judgment for that of the state court" and grant habeas relief based solely on an incorrect application of federal law; "[r]ather, that application of law must also be objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 1174 (2003) (stating that the "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous, rather it must be objectively unreasonable.) Woodford v. Visciotti, 537 U.S. 19, 123 S.Ct. 357, 361 (2002)("The federal habeas scheme leaves primary responsibility with the state

courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable.")

Under the unreasonable application clause, the court must determine whether the state court made and "unreasonable application" of the totality of the circumstances test in determining whether Petitioner's confession was voluntary. The Court notes that "[c]oercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment." Colorado v. Connelly, 479 U.S. 157, 167 (1986). Absent a causel connection between coercive police conduct and the confession, no due process violation exists. Id. at 164. Thus, the court must consider the crucial elements of police misconduct in addition to the following factors that are part of the "totality-of-the-circumstances" test: "the length of the interrogation . . ., its location, . . . its continuity, . . . the defendant's maturity, . . . education, . . . physical condition, . . . and mental health." Withrow, 507 U.S. at 693 (citations omitted.) Although lack of parental notice is another factor to consider in the totality of the circumstances, due process does not require such notice. United States v. Doe, 155 F.3d 1070, 1073 (9th Cir. 1998). Under Connelly, "personal characteristics of the defendant are constitutionally irrelevant absent proof of coercion." United States v. Rohrbach, 813 F.2d 142, 144 (8th Cir. 1987). Thus, unless the trial court found coercive police conduct, specific factors such as Petitioner's age, mental capacity, cultural background, education are irrelevant. See, Derrick v. Petereson, 924 F.2d 813, 818 (9th Cir.1991).

In challenging the voluntariness of his confession, Petitioner cites the following factors including: (1) his age, cultural background, and education, (2) the lack of parental notice, (3) the length and location of the interrogation, and the lack of food during the interrogation, and (4) the interrogation techniques. The Court will consider these factors in analyzing whether the state court reasonably applied the clearly established federal law to Petitioner's claims.

1. Petitioner's Age

Petitioner contends that the State unreasonably applied the totality of the circumstances test federal law because his age renders his confession involuntary. The appellate court noted that Petitioner was 17 ½ at the time of the interrogation. (document # 28, Exh. B at 8) Petitioner contends that the appellate court misstated Petitioner's age. The record reflects that Petitioner was born on May 9, 1974. (document #28, Exh. C at 6-7) Thus, at the time of the interrogation, he was 17 years, five months and 16 days old. The Court finds that the fourteen day difference in Petitioner's actual age and the appellate court's characterization does not render the appellate court's determination unreasonable. While Petitioner's age is a factor to consider in the totality of the circumstances, the appellate court considered this factor.

2. Petitioner's Cultural Background

Petitioner argues that although he was

seventeen, he was "not a typical, savvy American teenager," but had spent the first eight years of his life in Thailand, was unable to clearly express himself in English, and was deferential to authority due to his Thai upbringing. (document # 2 at 30-31) Thus, Petitioner argues that the state courts failed to give appropriate weight to his cultural background in assessing the voluntariness of his statement.

Respondents state that evidence presented during sentencing showed that Petitioner has spent the first five years of his life in rural Korat Province, Thailand. (S 1/18/94; 177-86) When Petitioner was five, his father died. (Id. at 180-81) Petitioner's mother left Thailand less than a month later, leaving Petitioner with an aunt who lived outside of Bangkok. (Id. at 181, 183-86) Petitioner and his mother had no contact for three years. (Id. at 186) Petitioner's mother later married Brian Doody, an American serviceman, while living in Germany. (Id. at 187, 195-96) The couple later returned to Thailand, and then took Petitioner to Germany. (Id. at 196-98) They lived in Germany for the next year and a half. (Id. at 202, 207-08, 210) Brian Doody was transferred to Georgia in 1984, where he adopted Petitioner. (Id. at 209-10) Brian Doody was sent to Korea but Petitioner and his mother stayed in Georgia. (Id. at 210, 1/21/94; 28) A year later, Brian was transferred to Guam and was joined by his family. (1/24/94; 29) In 1989, Brian Doody was transferred to Luke Air Force base in Arizona, where he was living with his family at the time of the Temple incident. (1/28/94; 210. 1/21/94; 15, 29)

Some of these facts were presented during the voluntariness hearing. There, Detective Sinsabaugh testified that the Task Force knew that Petitioner was "of Thai descent." (document # 7, Exh. D at 58) During an interview with Sinsabaugh at Luke Air Force base on September 10 1991, Petitioner stated that he was born in Thailand and came to the United States with his mother and stepfather, who was in the United States Air Force. (Id. at 62) Sinsabaugh also knew that Petitioner's mother and brother were Buddhists. Thus, the record of the voluntariness hearing shows that the interrogators knew that Petitioner was born in Thailand, his cultural background was Thai and Buddhist, that he was not living with his biological father, and that he was part of a military family.

Essentially, Petitioner argues that due to his Thai background, he was deferential to authority and had difficulty communicating in English. The record indicates that although Petitioner was soft spoken, he could clearly communicate in English and did not appear to have difficulty conversing with the officers. (See document # 28, Exh. C at 46) Indeed, Petitioner told the officers that he only understood a "little bit" of the Thai language. (Id.)

Moreover, Petitioner's respect for authority, which derived from his Thai background, does not render his confession involuntary. See Liu v. State of Delaware, 628 A.2d 1376, 1380-1381 (Del. 1993) (holding that totality of circumstances indicated that defendant's decision to waive his Miranda rights was not compelled by his Chinese heritage and noting that although cultural heritage is relevant in assessing the

totality of the circumstances, police officers must not be required to "anticipate the frailties or idiosyncracies of every person whom they question."); United States v. Yunis 859 F.2d 953, 962-66 (D.C. Cir. 1988)(holding that Lebanese national's seasickness, uncomfortably hot room, and lack of familiarity with American legal culture did not render waiver of his Miranda rights involuntary.) In view of the facts before the state court at the suppression hearing, the court did not make an unreasonable application of law regarding Petitioner's cultural background.

3. Education.

Petitioner contends that his level of education supports a finding that his confession was involuntary. Petitioner argues that because the voluntariness record discloses nothing about Petitioner's education in any prior year, including whether he had learned to read English, the court cannot conclude that placement in eleventh grade was a reflection of his academic level. Petitioner goes on to speculate that in view of Petitioner's early years in Thailand, his relocation to Georgia, Guam and then to Arizona, it is unlikely that Petitioner had achieved an eleventh grade academic level. The Court finds that although Petitioner's speculation is interesting, it does not render the appellate court's determination that Petitioner's education did not suggest that his confession was involuntary unreasonable in view of the evidence presented.

At the voluntariness hearing, Riley testified that Petitioner "indicated that he was or had an overall B

average in school," (document # 7, Exh. B at 80-81). The tapes and the transcript of the interview indicate that had received "about a B A average." (document # 24, Supp. App. 50; cassette tape # 1)

With regard to Petitioner's intelligence, Sinsabaugh testified that he thought Petitioner was intelligent because during their interview on September 10, 1992, Petitioner had expressed an interest in becoming a pilot. (document # 7, Exh. D at 61 "he appeared real intelligent [based on] his goals.") Petitioner also expressed an interest in attending college. (document # 7, Exh. M, Tape 2 at 18)

In view of the evidence that Petitioner was in eleventh grade, have received a "B A average" on his last report card, and expressed an interest in college and pursuing a career, the appellate court reasonably concluded that Petitioner had a B average, was "completing" eleventh grade, and was "educated." The state court's analysis of Petitioner's education as part of the totality of the circumstances test was not objectively unreasonable.

4. Maturity Level

Petitioner also contends that the record contains little information regarding his maturity level. Petitioner told police that he participated in the R.O.T.C. Honor Guard and the R.O.T.C. Color guard, had worked at McDonald's in the past, and was presently employed at the commissary at Luke Air Force Base. (document # 7, Exh. B at 80-85) Petitioner contends that absent greater detail, such as

the length of Petitioner's employment and his performance in these various job and activities, Petitioner's employment and ROTC participation indicates little about Petitioner's maturity level. The Court disagrees.

As the appellate court noted, Petitioner was in high school honor guard and color guard for the R.O.T.C. (document # 28, Exh. B at 8) Petitioner told detectives that he had been a ROTC member for three years, and that he was "in charge" of the Color Guard and Honor Guard. (document # 28, Exh. C at 5-6; document # 7, RT 11/9/92 p.m. at 19) In addition, Petitioner had been a member of the Civil Air Patrol. (document # 7, Exh. M, Tape 2 at 20)

The evidence also established that Petitioner had worked at McDonald's and the Luke Air Force Base Commissary. (document # 7, Exh. V at 80-81; document # 28, Exh.C at 19-20, 29, 38-40, 42-44; document # 7, Exh. M, Tape 2 at 4, 7) Petitioner also told Detective Sinsabaugh that in addition to working at the commissary, he worked at Anthony's Pizza located on the Base. (document # 7, Exh. D at 63) The Court finds that based on this employment history and activities, the appellate court reasonably concluded that Petitioner was a mature 17 year old.

Additionally, other evidence supports a finding that Petitioner was a mature high school student. Petitioner was the oldest of four children. (document # 28, Exh. C at 41-42) Petitioner moved out of the house and into an apartment with Myers and Caratachea, and Petitioner signed the apartment lease. (document

28, Exh. C at 7, 15-18, 20-26, 31, 34, 36; Exh. A at 33, 62; Exh. D at 82; Exh. G at 21; Exh. I at 97-98; Exh. M, Tape 5 at 5-6, 9, 12-13) Based on the foregoing, the state court made a reasonable application of the totality of the circumstances test in considering Petitioner's maturity level.

5. Experience with Law Enforcement

Petitioner also contends that the state court failed to consider his lack of prior criminal history or experience with the criminal justice system. Contrary to this assertion, the state court specifically considered Petitioner's lack of experience with law enforcement. (document # 28, Exh. A at page 33)

In Villafuerte, 75 F.3d at 1365-66, the court rejected a claim that defendant was uneducated and lacked experience with police. Several days before the interrogation that gave rise to the confession, Petitioner had been questioned by Detective Sinsabaugh. The Court finds that the state court properly considered Petitioner's lack of experience with law enforcement. Although Petitioner had limited exposure to the police, the appellate court reasonably concluded that this factor does not render his confession involuntary.

6. Lack of Parental Notice

Petitioner further argues that his confession was involuntary because police took "extraordinary [] steps to insure that [Petitioner's] father would learn nothing about the interrogation and would not come to the

Task Force offices to provide a source of support or advice for his son." (document # 2 at 31) Petitioner presented this claim to the Court of Appeals which rejected it based on Petitioner's age and his "specific consent to speak with the officers without his parents." (document # 2 at A.11) The Court of Appeals noted that "a parent's absence itself does not, in itself, render a confession involuntary" and that the "absence of a parent weighs less heavily when, as here, the juvenile has not requested" one's parents. (document # 24, Supp. App. 10) The record establishes that the Court of Appeals did not make an unreasonable determination of the facts in view of the evidence.

Although lack of parental notice is another factor to consider in the totality of the circumstances, due process does not require parental notification. United States v. Doe, 155 F.3d 1070, 1073 (9th Cir. 1998)(finding juvenile's confession voluntary despite lack of parental notification where he never requested that police notify his parents.); Derrick v Peterson, 924 F.2d 813, 819 (9th Cir. 1990)(finding juvenile's confession where petitioner never requested that his parents be notified and noting that no authority mandates parental notice.). See, Haley v. Ohio, 332 U.S. at 600 (stressing a minor's need for "counsel and support if he is not become the victim first of fear, then panic" during interrogation).

Here, before interviewing Petitioner, an officer asked Petitioner if he "would want to have your parent or guardian present during our conversation with you now." (document # 28, Exh. B at 11) Petitioner responded, "It doesn't' matter." (Id.) The officer

clarified, "It doesn't matter? (Id.) And Petitioner replied, "Uh-huh." (Id.) On the Miranda warnings form, Petitioner initialed "no" stating that he did not want his parent or guardian present during the interview. (document # 28, Exh. C and D) Petitioner now asserts that he never rejected the presence of a parent. The record does not support this claim.

Petitioner also asserts that the police took extraordinary measures to ensure that his step-father would not be present when Petitioner was questioned. During the relevant period, Petitioner was living in Arizona with Alex Garcia and his family and Petitioner's mother and step-father were living in Colorado. (document # 7, Exh. A at 82, 138) During the investigation of the Temple Murders, police decided that they wanted to question petitioner's step-father and brother who were living in Colorado at the time. (Document # 7, Exh. D at 68, I at 94, J at 36) On October 16, 1991, a detective interviewed them over the phone. (document # 7, Exh. D at 69, 139; Exh I at 94) Detective Sinsabaugh wanted to meet Brian and David in person, in particular so that David could identify property that police had recovered which might have been taken from the Temple and so that David could advise them about life at the Temple. (documents # 7 Exh. B at 14-15; Exh. C at 75; Exh. D at 73; Exh. J at 43) Thus, Detective Sinsabaugh obtained permission to pay for Brian and David to fly to Arizona. (document # 7, Exh. D at 0-0, 139; Exh. I at 95, J at 37-38) Lieutenant Heath was in charge of travel arrangements. (document # 7, Exh. I at 95) Later, Brian told Sinsabaugh that he wanted to drive. Sinsabaugh responded that the department would pay

for gas, food, and lodging for one night. (document # 7, Exh. B at 119; Exh. D at 70, 140; Exh. J at 51, Exh. K at 31) They agreed that Brian would be paid for his expenses before he left Colorado. (document # 7, Exh. D at 142)

Police interviewed Brian and David on October 24, 1991 as planned. (document # 7, Exh. B at 112-14, 117-18; Exh. C at 75) The interview lasted 1-2 hours. (document # 7, Exh. A at 137, Exh. D at 83) After the interview, police requested the phone number where they could reach Brian after he left the hotel but before he returned to Colorado. (document # 7, Exh. B at 120-21, 127) Brian declined to give police that information. (Id.) Detective Sinsabaugh arranged to meet Brian for lunch the next day. (document # 7, Exh. B at 121, Exh. C at 69) Brian came to the station on October 25, but Sinsabaugh cancelled lunch because the investigation had gotten busy because the murder weapon had been found. (document # 7, Exh. B at 126-27, J at 52-53)

The officers subsequently had a briefing and decided that they wanted to speak with Petitioner, Garcia, and Mike Myers, (document # 7, Exh. I at 98) The officers did not further discuss Brian Doody. (document # 7, Exh. B at 123, 148) Police did not arrange to "get rid" of Brian. (document # 7, Exh. B at 148; Exh. B at 41) Rather, Brian's trip had been pre-arranged and he was scheduled to return to Colorado after his 2-day stay in Phoenix.

The record does not support Petitioner's claim that police deliberately sent his step-father away so that he would not be present during the interview.

First, Brian Doody was living in Colorado. Brian would not have even been in Phoenix unless police had requested to interview him and paid his way. The detectives who interviewed Petitioner were not involved with Brian Doody's visit. (document # 7, Exh. A at 143-44) Petitioner was no longer living with his family but had lived in an apartment and then moved in with Alex Garcia and his family. (document # 7, Exh. A at 138)

Unlike Alvarado, where petitioner's parents accompanied him to the station but were refused permission to be present, 316 F.3d at 844, Petitioner did not request his parents' presence despite being advised that he could have them present. In contrast, the police in Alvarado never advised petitioner of his Miranda rights. 316 F.3d at 844, 854.

Petitioner misstates the record in stating that the appellate court found that police took "extraordinary steps. . . to ensure that Petitioner's father could not be available . . ." (Supp. Memo at 21) The appellate court did not expressly comment on this issue, rather it stated that "whether the state acted to prevent Doody's father from attending the interrogation could not have affected the voluntariness of Doody's statements," in view of Doody's age and his consent to speak with the police without his parents. (document # 28, Exh. B at 10, n. 5) The Court finds that the appellate court's findings regarding the parental notice issue are reasonable in view of the evidence. See, Moran v. Burbine, 475 U.S. 412 (1986)(failure of police to inform arrested suspect of the presence of a lawyer whom his sisters had hired

unbeknownst to the suspect did not render suspect's confession inadmissible because event unknown to suspect can have no bearing on his capacity to waive rights.

7. Length and Location of Interrogation, and Lack of Food during Interrogation

Petitioner argues that the following factors render his confession involuntary: (1) length of the interrogation, which began at 11:00 p.m. and continued uninterrupted for nearly thirteen hours, (2) the location of the interrogation which took place in a small room with no furniture except "armless chairs," and (3) the fact that although Petitioner was given the opportunity to request food, he did not receive any. (document # 2 at 32-33) Petitioner presented these arguments to the Court of Appeals which rejected them based on other evidence which the court found indicated that Petitioner voluntarily confessed. (document # 2 at A.8 – A.9) As discussed below, the Court of Appeals' decision is a reasonable application of the law.

Although the length of interrogation is relevant to determining whether a suspect confessed voluntarily, length alone does not establish that police overcame a suspect's will. See, United States v. Haswood, 2003 WL 22833048 (9th Cir, December 1, 2003)(stating that even assuming interrogation lasted "all day," coercion typically involves far more outrageous conduct.)(citing Mincey v. Arizona, 437 U.S. 385, 398-99 (1978)). Rather, in addition to the length of the interrogation, the Supreme Court relies on

factors including the suspect's opportunity to rest, the point during the interrogation when the suspect confesses, and the suspect's mental ability in determining whether a confession is involuntary. See, Mince v. Arizona, 437 U.S. 385, 398-99 (1978)(finding statement involuntary where obtained from defendant who was in hospital, in near coma, and in great pain while fastened to tubes, needles, and breathing apparatus); Ashcraft v. State of Tennessee, 322 U.S. 143, 155 (1944)(finding confession involuntary where police questioned defendant for thirty-six hours during which he was held incommunicado, without sleep or rest, and relays of investigators and lawyers questioned defendant who denied involvement in his wife's murder for nearly the entire 36-hour period); Haley v. Ohio, 332 U.S. 596, 598-601(1947)(finding fifteen year old's confession involuntary where he confessed after five hours of interrogation starting at midnight, where police worked in relays without warning him of his rights, and without benefit of counsel or his family, and noting that after defendant confessed, he was kept incommunicado for three days during which time police refused to permit the lawyer retained to see defendant); Reck v. Pate, 367 U.S. 433, 435-442 (1961)(holding that confession of nineteen year old was inadmissible where he was mentally retarded, was interrogated in six to seven hour blocks during an eighty-hour period by teams of interrogators, was without adequate food, without counsel and assistance of family or friends, was hospitalized for a brief period due to physical ailments, and was in intense pain following release from the hospital.); Blackburn v. Alabama, 361 U.S. 199, 204-05 (1960)(holding that confession was involuntary where defendant had a

long history of mental illness and was insane at the time of the confession, and was questioned for eight or nine hours in closely confined quarters by as many as three officers at a time.)

In this case, Petitioner voluntarily accompanied police to the station at approximately 9:00 p.m. After being read his Miranda rights and agreeing to talk with police without a parent present, Petitioner was questioned for nearly thirteen hours. After three hours of questioning Petitioner admitted that he had borrowed the Marlin rifle used in the murders. (cassette tapes # 4-5). Then, approximately seven hours into the interrogation, Petitioner admitted that he helped plan and participated in the Temple incident. (cassette tape # 10) Significantly, Petitioner then described the events at the Temple in a detailed, narrative fashion which spanned several hours. (cassette tapes # 10-14) Despite the length of the interrogation, Petitioner admitted involvement rather early on and when he did confess, his statement was detailed and lengthy. Thus, the Court finds that the length of the interrogation does not render the confession involuntary.

The Court also finds that the appellate court reasonably concluded that the location of Petitioner's interrogation did not render the confession involuntary. Although Petitioner's interrogation was conducted in a small room, the record does not contain evidence that the conditions contributed to Petitioner's confession. But see, 361 U.S. 199, 204-05 (1960)(finding confession involuntary where in addition to taking place in a room about four by six feet,

defendant was insane at the time of the confession, as many as three officers were present at once, the interrogation lasted nine hours, and the deputy sheriff composed the written confession); Reck, 367 U.S. at 442-43 (finding confession involuntary where defendant was shuttled between several police stations and interrogation rooms, was placed on public exhibition in "show ups," was without adequate food for several days, was hospitalized for stomach problems, and was of subnormal intelligence.); Clewis v. State of Texas, 386 U.S. 707, 709-11 (1967)(holding that confession was involuntary where defendant, who had a fifth grade education, was interrogated over a nine-day period, was never fully advised of his right to counsel, gave his first statement after he had been in custody for 38 hours, had little food or sleep and appeared sick, his confession was inconsistent with the facts of the shooting, and he was interrogated in several buildings and was taken to the grave site and to another town.)

Additionally, the fact that Petitioner did not receive any food during the interrogation does not render his confession involuntary. Several times during the interrogation, police officers offered Petitioner beverages or food. (cassette tapes # 3, # 5, and # 10). Petitioner received three drinks during his interrogation but never requested food. Although Petitioner's interrogation lasted thirteen hours, there is no evidence that the lack of food contributed to his confession. But see, Reck, 367 U.S. at 441-43 (finding confession involuntary where defendant was without solid food for several days); Clewis, 386 U.S. at 709-711 (finding confession involuntary where, *inter alia*,

defendant had very little food during a nine-day period); Greenwald v. Wisconsin, 390 U.S. 519, 520-21 (1968)(finding confession involuntary where petitioner, who suffered from high blood pressure, was not offered food until after he had signed a written confession, twelve hours after interrogation commenced, and where petitioner's request for an attorney was ignored.)

8. Interviewing Techniques/Coercive Conduct

Petitioner next argues that the state court unreasonably applied federal law in finding that the interrogation techniques did not amount to coercive conduct. Petitioner claims that the interrogation techniques "were designed to put tremendous psychological pressure on the youth." (document # 2 at 33) The techniques Petitioner challenges include: (1) commiserating with Petitioner; (2) relentlessly questioning Petitioner even when he was silent; (3) pleading with Petitioner to provide information; (4) lying to Petitioner about what the police knew; (5) trying to convince Petitioner that telling police what he knew was in his best interest, (6) telling Petitioner that what he said would stay inside the interrogation room and would not be shared with the other suspects, (7) appealing to Petitioner's sense of honor and duty, and encouraging him to "join [their] team," and (8) exploiting Petitioner's hopes to return to a normal life. (document # 2 at 33-36) The state court rejected Petitioner's argument that he was unfairly pressured to confess, though the court recognized that the officers "used a variety of approaches," including an appeal to his "sense of duty," and that he was encouraged to

trust and confide in his interrogators. (document # 24, Supp. App. 12) The appellate court agreed with the trial court that portions of the interrogation were "aggressive, energetic, and forceful," but found that the interrogation was "permissible, i.e. lawful." The court also recognized that Petitioner "did not speak for long periods during the interrogation," but stated that he did not "invoke his right to remain silent or to an attorney." The court characterized his interrogators' tactics as "deceptive, in part," but not "so egregious" as to overcome his will. (document # 24, Supp. App. 13) The Court finds that the appellate court's analysis constitutes a reasonable application of federal law as discussed below.

Police efforts to create an atmosphere conducive to confessing alone do not violate the due process clause. See, Amaya-Ruiz v. Stewart, 121 F.3d 486, 494-95 (9th Cir. 1997)(stating that encouraging defendant to tell the truth did not constitute coercive conduct); United States v. Miller, 984 F.2d 1028, 1031-31 (9th Cir. 1993)(stating that neither "mere emotionalism and confusion," nor mere "deception" renders a confession involuntary)(citing Frazier v. Cupp, 394 U.S. 731, 737-39 (1969)). Rather, the central issue is whether the "defendant's will was overborne when the defendant confessed." Miller, 984 F.2d at 1031 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (1973)). Additionally, although the Supreme Court recognizes that statements obtained by a promise are involuntary, this broad rule does not "invalidate, per se, all statements made by a suspect in response to a promise made by law enforcement personnel." United States v. Guerrero, 847 F.2d 1363,

1366 (9th Cir. 1988)(stating that statements by an interrogator do not render a confession involuntary "even when its accompanied by a promise to recommend leniency or by speculation that cooperation will have a positive effect.") Rather, "[t]he promise must be sufficiently compelling to overbear the suspect's will in light of the attendant circumstances." 847 F.2d at 1366. (holding that confession was voluntary despite the following circumstances (1) police denied defendant's request to postpone the interrogation by one day, (2) police used the "good guy, bad guy" technique, (3) one interrogator falsely told defendant that his codefendant had confessed, (4) the United States Attorney promised to get defendant psychiatric help, and (5) the United States Attorney told defendant that a confession might help him during sentencing and advised him that "only the truth can help you.") See also, United States v. Wolf, 813 F.2d 970, 972-75 (9th Cir. 1987)(finding confession voluntary notwithstanding claim that Mexican authorities threatened him and that an interrogator expressed disbelief at the defendant's statement to elicit further information from him). No due process violation occurs where authorities do not promise any "tangible benefit." Guerrero, 847 F.2d at 1367 (noting that the prosecutor did not promise defendant any tangible benefit, such as reduced charges or a recommendation of a lenient sentence.)

Moreover, exaggerating the evidence against the suspect and encouraging the suspect to confess do not necessarily render a confession involuntary. See, Amaya-Ruiz, 121 F.3d at 495 (stating that officers' misrepresentation that a witness has seen the

defendant did not constitute coercion); Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986), on remand from, Miller v. Fenton, 474 U.S. 104 (1985)(holding that confession was voluntary despite fact that interrogators sympathized with accused and encouraged him to "unburden himself" and confess to murder, and lied to defendant regarding evidence in the case.) In this case the interrogators' appeal to Petitioner's sense of honor based on his participation in the R.O.T.C. did not violate the due process clause. See, United States v. Miller, 984 F.2d 1028, 1031-32 (9th Cir. 1993)(finding confession of Mormon suspect voluntary despite appeal to his religious beliefs by special agent who was also a bishop in the Mormon church.)

After reviewing the record in this matter, including the audio cassette tapes of Petitioner's interrogation, in view of the foregoing principles, the Court concludes that Petitioner's confession was voluntary and that no due process violation occurred n obtaining that confession. Although Petitioner did not speak for several long periods during the interrogation, he never invoked his right to remain silent or his right to counsel. Interrogators never promised Petitioner any tangible benefit in exchange for his confession. Rather, officers merely stated that what Petitioner said would not leave the interrogation room. While such a tactic is deceptive, it does not rise to the level of a due process violation.

Additionally, the following factors indicate that Petitioner's will was not overborne and that his confession was voluntary. First, after approximately

three hours of questioning, Petitioner admitted that before the Temple Murders, he had borrowed the Marlin rifle used in the murders. (cassette tapes # 4-5). Petitioner admitted that he helped plan and participated in the temple robbery after approximately seven hours of questioning. (cassette tape #10) But see, Ashcraft, 322 U.S. 155 (finding confession involuntary where defendant confessed at the end of 36 hours of interrogation). Significantly, following his admission, he described the events in a detailed, narrative fashion which spanned several hours. (cassette tapes # 10-14) But see, Blackburn, 361 U.S. at 204-05 (finding confession involuntary where deputy sheriff composed the written confession); Spano v. New York, 360 U.S. 315, 318-22 (1959)(finding confession involuntary where (1) police ignored defendant's repeated requests to contact retained counsel, (2) a friend of defendant's who was a police officer questioned defendant and falsely told him that defendant had gotten him into trouble, and (3) defendant had a history of mental illness and did not make a narrative statement but responded to leading questions in a question-and-answer confession.) Based on the foregoing, the Court concludes that the State Court's decision that Petitioner voluntarily confessed rests on a reasonable application of federal law and a reasonable determination of the facts. Petitioner's voluntariness claim, therefore, fails.

D. State Court's Determination of the Facts

Petitioner also contends that the state court decision rests on an unreasonable determination of the facts under 2254(d)(2). In support of that claim,

Petitioner challenges the following factual findings: (1) Petitioner remained "alert" and "responsive" throughout the interview; (2) Petitioner was "completing" his junior year and maintained a "B" average; (3) Petitioner was fluent in English; and (4) police did not make promises to Petitioner.

1. Petitioner remained alert.

Petitioner contends that the state court made an unreasonable determination of the facts in concluding that Petitioner remained alert during the interrogation. The Supreme Court has stated that "factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, 28 U.S.C. § 2254(c)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on actual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding . . . ." Miller El v. Cockrel, ___U.S.___, 123 S.Ct. 1029, 1041 (2003); See Torres v. Prunty, 223 F.3d 1103, 1108 (9th Cir. 2000)(stating that the standards governing reasonableness under § 2254(d)(2) are the same for reasonableness under § 2254(d)(1)). The Court finds that the Court of Appeals' conclusion that Petitioner remained alert and attentive throughout the course of the interrogation is not an unreasonable determination of the facts in view of the evidence presented.

Riley testified that during the drive to the Task Force, Petitioner appeared "very alert," "polite, attentive, and just overall pleasant." (document # 7, Exh. B at 68-69) Riley also testified that, when the 13-

hour interview began, Petitioner's posture was good and that he maintained eye contact. (document # 7, Exh. B at 101) There is also evidence that over time Petitioner became "less attentive." (Id.) "His responses were much more quiet and non-direct . . . . {E}ye contact was not there." (Id. at 101-02). However, when Riley, who was in the interrogation room until almost 5:00 a.m., was asked whether Petitioner appeared tired at anytime during the interview, Riley testified that, "I'd have to say for the most part no. He didn't really display any real overt sign of being fatigued or tired." (document # 7, Exh B at 89, 106-07, Exh. C at 47) Also, Detective Sinsabaugh testified that when he first entered the interrogation room at 2:45 a.m., Petitioner was "very erect, had a military bearing, and he appeared alert." (document #7, Exh. D at 101) Captain White testified that when he entered the room to join the interrogation at approximately 5:55 in the morning, "Jonathan was sitting upright in a chair...almost at attention when I first came in." (RT 11/10/92:83) White testified that Petitioner understood questions and gave appropriate answer and did not indicate "that he was too tired or sleepy to talk." (RT 11/10/92:83-84)

Petitioner also contends that, contrary to the appellate court's finding, the evidence shows that he was not responsive during the entire interrogation. Indeed, there are portions of the audiotapes of the interrogation where Petitioner is silent. However, Petitioner did not request any breaks in the interrogation and never requested a parent or counsel. Once Petitioner was ready to talk, he gave a description of events at the Temple which spanned

several hours.

Petitioner contends that the record does not support a conclusion that Petitioner was alert and attentive throughout the interrogation. Although fact finds reviewing the foregoing evidence could reach different conclusions regarding whether Petitioner remained alert and responsive during the entire interview, the Court of Appeals' determination that Petitioner remained "responsive" throughout the interview is not objectively unreasonable in view of the evidence submitted.

2. Completing Junior Year and Maintained "B" Average

Petitioner further challenges the appellate court's conclusion that he was "completing" his junior year in high school. During the relevant period, Petitioner was in the fall of his junior year of high school. The appellate court's use of the word "completing" is not an objectively unreasonable determination of the facts. Although Petitioner had technically only been in school for a few months at the time of the interrogation, he was certainly in the process of completing his junior year.

Petitioner next argues that the notion that Petitioner maintained a "B average" is unsupported. Again, Petitioner appears to be splitting hairs to find fault with the appellate court's factual determinations. Petitioner testified that on his most recent report card, he had received a "B A average." (document # 24, Supp. App. At 50) Petitioner was unable to provide

specific information regarding his grades for the fall of his junior year because report cards had not yet been issued. Thus, Petitioner's statement to police was based on the most recent information regarding Petitioner's grades. The appellate court's conclusion that Petitioner maintained a B average was reasonable based on the evidence presented.

3. Fluency in English

Petitioner also argues that the determination that Petitioner spoke "fluent" English is belied by the audiotapes and the transcript of the interrogation. The appellate court's determination regarding Petitioner's English proficiency was based on the audiotapes of the interrogation. The appellate court found that Petitioner "spoke fluent, although lightly accented, English." (Exh. A to document # 28) This finding is reasonable in view of the evidence presented. Petitioner informed the police of his Thai background however, he also told police that he could only speak "a little bit" of the Thai language. (Exh. C to document # 28 at 46) Petitioner stated that "I can get along with them, it's just that I can't communicate that well with them." (Id.) Additionally, when asked about a Thai individual at the Temple, Petitioner stated that he could barely understand him because that individual spoke Thai and his English was not very good. (document # 7, Exh. M, tape 2 at 2) The evidence before the appellate court indicates that Petitioner's primary language was English. Thus, the determination that Petitioner spoke fluent English was not an unreasonable determination of the facts.

4. Promises Made to Petitioner

The Court of Appeals also rejected Petitioner's argument that the officer's promises that Petitioner's statements would not leave the room was a promise that affected the voluntariness of the statement. In so ruling, the court wrote that the officers assured Petitioner that his words would not be disclosed to other suspects, they did not imply that his statements would not be used against him, and that, in any event, he did not establish that he relied on the statements in confessing. (document # 24, Supp. App. at 12) Petitioner contends that the Court of Appeals' determination that no promises were made to Petitioner (document # 24, Supp. App. At 11-12) is also unreasonable in view of the evidence. Petitioner's challenge to the foregoing techniques on direct appeal failed. Specifically, with respect to Petitioner's claim that police officers elicited his confession by promising not to disclose his statements to the other suspects, the Court of Appeals found that Petitioner's claim failed because the officers did not "promise" or "offer any benefit to [Petitioner] in exchange for information." (document # 2 at A.11) The Court of Appeals further found that Petitioner did not establish that he relied on the police officers' statements in confessing. (Id. at A.12) Interrogators never promised Petitioner any tangible benefit in exchange for his confession. Rather, officers merely stated that what Petitioner said would not leave the interrogation room. While such a tactic is deceptive, it does not rise to the level of a due process violation.

In view of the foregoing, the Court finds that

Petitioner fails to establish that the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Accordingly, his due process claim fails.

III. Violation of Due Process Clause and Crane v. Kentucky[5]

Finally, Petitioner argues that his conviction violates the Constitution because the trial court prohibited him from arguing to the jury that, in considering the veracity of Petitioner's confession, the jury should consider the confessions of the Tucson Four which the State itself claimed were false. In support of this claim, Petitioner relies on Crane v. Kentucky, 476 U.S. 683 (1983), for the proposition that "a defendant has a fundamental constitutional right . . . to present evidence casting doubt on the credibility of a confession . . . and to argue to the jury that he is innocent notwithstanding his admission of guilt." (document # 2 at 44)

In Crane, the trial court initially denied defendant's motion to suppress his confession after determining that the confession was voluntary. Thereafter, the court precluded defendant from arguing to the jury that the "very circumstances

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[5] 476 U.S. 683 (1986)

surrounding the giving of the confession are enough to cast doubt on its credibility [because] evidence bearing on the length of the interrogation and the manner in which it was conducted would show that the statement was unworthy of belief." Crane, 476 U.S. at 685. On review, the Supreme Court held that "regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, an entirely independent question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility." Id. at 689. The Court held that the right to present a complete defense and the opportunity to be heard would prove empty if the State could exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. "In the absence of any valid state justification," the Court concluded, "exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing crucible of meaningful adversarial testing." 476 U.S. at 690-91 (internal quotations marks omitted.)

Contrary to Petitioner's assertion, Crane does not mandate that the trial court admit evidence of interrogations other than that of the defendant. See United States v. Sitton, 968 F.2d 947, 958 (9th Cir. 1992)(stating that Crane did not require district court to admit evidence of defendant's previous encounter with police because it was not relevant to establish the reliability of his statements to police nearly three

weeks later); Stano v. Dugger, 883 F.2d 900, 908-09 (11th Cir. 1989), remanded on other grounds, 901 F.2d 898 (11th Cir. 1989)(affirming the trial court's exclusion of evidence that defendant falsely confessed to other murders which he did not commit or for which he was not charged, and expert testimony that mentally ill people often confess to crimes they did not commit); compare, La Grand v. Stewart, 133 F.3d 1253, 1267 (9th Cir. 1998)(rejecting petitioner's claim that he was denied right to present a complete defense under Crane where the court excluded a codefendant's confession as unreliable.) Although Crane recognized a criminal defendant's constitutional guarantee of a "'meaningful opportunity to present a complete defense,'" Crane held that, on the facts of the case, "the blanket exclusion of the proferred testimony about the circumstances of petitioner's confession deprived him a fair trial." Crane, 476 U.S. at 690 (emphasis added)(quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).

Here, the trial court did not exclude evidence that bore on the admissibility of Petitioner's own confession. The issue, then, is whether the trial court erred in excluding – on relevance grounds – Petitioner's potential argument to the jury that, because the State elicited false confessions to the Temple killings from the Tucson Four, Petitioner's own confession also lacked reliability. Petitioner cites no United States Supreme Court case – and this Court's independent research has found no such decision – that requires a trial court to permit a defendant to argue that there is a relationship between the defendant's own confession and that of a different individual. In

fact, the Crane decision recognizes that a trial court may exclude evidence of a confession's credibility if there is "any valid state justification." 476 U.S. at 690-91. This Court agrees with the State trial court that the irrelevance of the Tucson Four confessions provided the sort of "valid state justification" to exclude the argument to the jury. "[T]he Constitution leaves to the judges who must make these decisions wide latitude to exclude evidence that is repetitive . . ., only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues." Crane, 476 U.S. at 689-90. The Supreme Court has "never questioned the power of States to exclude evidence through application of evidentiary rules that themselves serve the interests of fairness and reliability." Id. The trial court's exercise of its discretion to exclude irrelevant evidence regarding circumstances of other individual's confessions does not support federal habeas relief because the trial court did not unreasonably apply clearly established federal law as determined by the United States Supreme Court under 28 U.S.C. § 2254(d)(1).

Moreover, Petitioner was not denied the right to present a complete defense. The trial court permitted Petitioner to present evidence regarding the circumstances of his interrogation and confession. Additionally, two of the Tucson Four, Mark Nunez and Leo Bruce, testified on Petitioner's behalf regarding the circumstances of their arrests and the substance of their confessions. (Respondents' Exh. O at 3-64; JJ at 181-182) Based on the foregoing, the Court concludes that Petitioner was not denied his rights under either the due process clause or Crane to present a complete

defense including challenging the veracity of his confession. Accordingly, Petitioner's claim fails.

MOTION TO SUPPLEMENT THE RECORD, FOR EVIDENTIARY HEARING, AND FOR SCHEDULING ORDER

Petitioner also requests to supplement the record with "information developed within the last several years concerning the unreliability of confessions secured under the conditions that prevailed in this case" and has requested that the Court set a schedule "for such supplementation . . . ." (document # 17) On April 3, 2003, the Court ordered supplemental briefing in this matter. (document # 21) In response to the Court's order, Petitioner filed the information which he has previously sought permission to submit. (document # 17 and # 24) Namely, Petitioner attached several articles that were published in the Miami Hearld that document a series of false confessions that have become the subject of Florida and national news. (document # 17, Exh. A) Petitioner also attached an article from www.post-gazette.com that describes false confessions obtained in New York's Central Park Jogger cases. (document # 17, Exh. B)

The Court rejects this motion in its entirety. Although the Court is not unaware of news reports that document coerced confessions, the merits of Petitioner's habeas petition depend on what happened with respect to his own confessions. Accordingly, although Petitioner has already filed the supplemental materials with his most recent pleadings, the Court did not consider those materials in resolving this matter.

Petitioner also requests an evidentiary hearing. Petitioner requests an evidentiary hearing in this matter. Pursuant to 28 U.S.C. § 2254(e)(2),

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on claim unless the applicant shows that —
>
> (A) the claim relies on
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of underlying offense.

Additionally, an evidentiary hearing is not required in a habeas proceeding where reference to the state court record can resolve the issues. Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998)(holding that petitioner was not entitled to an evidentiary hearing on his claim on ineffective assistance of counsel.) Here, Petitioner had the opportunity fully to develop a factual record regarding his claims during the state court proceedings and the record is sufficient to resolve the issues presently before the Court. Accordingly, the Court finds that a hearing is not necessary.

Finally, there is no need for a briefing schedule in this matter. The Court has previously issued such schedules in this matter and the Petition is fully briefed.

CONCLUSION

Because Petitioner's claims for relief lack merit, the undersigned recommends that Petitioner's Petition for Writ of Habeas Corpus be denied.

Accordingly,

IT IS HEREBY RECOMMENDED that Petitioner's Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254 (document # 1) be **DENIED**.

IT IS FURTHER ORDERED that Petitioner's Motion to Supplement the Record, for a Briefing Schedule, and to set a Hearing Date (document # 17-1, 17-2, 17-3) is **DENIED**.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal rules of appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See, 28 U.S.C. § 636(b)(1) and Rules 72, 6(a) and 6(e) of the Federal rules of Civil Procedure. Thereafter, the parties have ten (10) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the

findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 12th day of December, 2003.

/s/_____
Lawrence O. Anderson
United States Magistrate Judge

Court of Appeals of Arizona,
Division 1, Department A.

STATE of Arizona, Appellee,
v.
Johnathan Andrew DOODY, Appellant.
No. 1 CA-CR 94-0120.

Sept. 5, 1996.
Review Denied Jan. 14, 1997.

Grant Woods, Attorney General by Paul J. McMurdie, Chief Counsel, Criminal Appeals Section and Crane McClennen, Assistant Attorney General, Phoenix, for Appellee.

Dershowitz & Eiger, P.C. by Victoria B. Eiger and Nathan Z. Dershowitz, New York City and Alan M. Dershowitz, Cambridge, MA and Peter Balkan, Phoenix, for Appellant.

OPINION

McGREGOR, Judge.

Johnathan Andrew Doody appeals his convictions and sentences for nine counts of first degree murder, nine counts of armed robbery, one count of burglary, and one count of conspiracy to commit armed robbery. For the reasons stated below, we affirm Doody's convictions and sentences.

I.

On the morning of August 10, 1991, members of the Wat Promkunaram Buddhist Temple discovered nine bodies inside the temple (the temple murders). The victims, including six Buddhist monks, lay face down in a circle, each shot in the head. Several of the victims had sustained additional, non-fatal shotgun wounds. Living quarters inside the temple had been ransacked, and items of personal property, including money, cameras, and stereo equipment, were missing. Police analysis of the bullets identified the murder weapon as a Marlin Model 60 .22 caliber rifle (Marlin rifle).

In September 1991, detectives received an anonymous tip implicating four men from Tucson (the Tucson Four) in the temple murders. During questioning, the suspects made inculpatory statements, based on which the state charged the Tucson Four with the temple murders.

In an attempt to locate the murder weapon, investigators issued an advisory directing all law enforcement agencies to report any Marlin rifles. Investigators subsequently received a report from Luke Air Force Base that a military officer had discovered a Marlin rifle during a search of a vehicle stopped in an unrelated incident. Investigators recovered the rifle from its owner, Rolando Caratachea, and later identified it as the temple murder weapon. Caratachea denied involvement in the temple murders and claimed that two minors, Doody and another friend, Alessandro Garcia, had

borrowed the rifle shortly before the murders.

Officers located Doody on October 25, 1991, at a high school football game. Doody agreed to accompany the officers to the police station for questioning. After arriving at the station, the officers advised Doody of his *Miranda* [FN1] rights. Doody indicated that he understood his rights and was willing to speak to the investigators without an attorney or his parents present.

> FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Doody's interrogation began at 9:25 in the evening. Doody initially denied any knowledge of the events at the temple but, after two and one-half hours, made inculpatory statements and, after approximately four more hours of questioning, admitted to being at the temple on the night of the murders. Doody claimed that Caratachea and Garcia approached him with a plan to conduct a "war game," which entailed surrounding the temple without setting off the security system. Doody stated that he went to the temple with Caratachea, Garcia, and two others, George Gonzalez and his friend. Doody maintained that he had not intended to enter the temple but that, once past the security sensors, he followed the others inside. Doody stated that Caratachea, Garcia, Gonzalez, and the other participant ransacked the temple's living quarters and gathered the victims into the main room. Doody stated that one of the monks recognized Gonzalez, who then ordered Doody to go outside and confirm

that the walls were sound-proof. Doody maintained that the shootings occurred while he was outside and that he did not know who fired the shots. Officers did not complete the interview until after 10:00 the next morning.

Officers also questioned Garcia on the night of October 25, 1991. Garcia initially invoked his right to remain silent but, after consulting his father, agreed to give a statement regarding his involvement in the temple murders. Garcia claimed that Doody conceived the plan to rob the temple and persuaded Garcia to join him. Garcia stated that, once inside the temple, Doody insisted they leave "no witnesses" and that, despite Garcia's attempts to dissuade him, Doody shot each of the victims in the head with a rifle he had borrowed from Caratachea. Garcia claimed that he panicked and fired his shotgun in the direction of the victims. Garcia maintained that only he and Doody participated in the robbery and murders.

Investigators searched Garcia's home and discovered several items taken from the temple. Investigators also found a shotgun, later determined to be the gun that fired the shotgun shells recovered at the crime scene. Based on the confessions and the evidence collected at Garcia's home, the state dismissed the charges against the Tucson Four and charged Doody and Garcia with the temple murders. Following a juvenile transfer hearing at which Caratachea testified that Doody and Garcia had borrowed his rifle shortly before the murders, the court ordered Doody and Garcia to stand trial as adults.

Early in the pretrial proceedings, Doody and Garcia moved to suppress their confessions. After a ten-day suppression hearing, the trial court denied both motions. Garcia thereafter entered a plea agreement, pursuant to which the state agreed not to pursue the death penalty and Garcia agreed to testify against Doody. In addition, Garcia pled guilty to nine counts of first degree murder and one count of burglary in connection with the temple murders, as well as one count of first degree murder in an unrelated homicide (the Cameron murder).

The state proceeded to trial against Doody. At trial, Garcia testified consistently with his interrogation statements. The trial court did not allow Doody to cross-examine Garcia regarding the Cameron murder or other unrelated and uncharged offenses that Garcia had committed with Caratachea, including a series of burglaries and conspiracy to commit murder and armed robbery (the Cruz offenses). After Caratachea invoked his fifth amendment right not to testify at Doody's trial, the trial court allowed Doody to read into evidence Caratachea's testimony from the juvenile transfer hearing, except those portions of the transcripts referring to Caratachea's prior crimes.

The jury ultimately convicted Doody on each count. With respect to the first degree murder charges, the verdicts revealed that the jury premised Doody's convictions on felony murder rather than premeditated murder. The trial court subsequently sentenced Doody to nine consecutive life terms on the

murder counts and eleven additional prison terms on the remaining counts. [FN2] Doody now appeals. We have jurisdiction pursuant to Arizona Revised Statutes Annotated (A.R.S.) section 12-120.21.

> FN2. Following a mitigation hearing, the trial court rejected the death penalty based on Doody's age, lack of prior criminal record, and the fact that, under the terms of his plea agreement, Garcia would not receive the death penalty despite the possibility that Garcia, rather than Doody, fired the fatal shots.

II.

Doody asserts that the trial court erred by failing to suppress his confession. Prior to trial, the trial court conducted an evidentiary hearing to determine the admissibility of Doody's statements. The suppression hearing lasted ten days, with testimony on each day. Based on the evidence presented at the hearing, including testimony from the officers who questioned Doody and the audio tapes of Doody's interrogation, the trial court concluded that Doody confessed voluntarily and waived his constitutional rights knowingly and intelligently. We will not disturb the trial court's determination absent clear and manifest error. *State v. Lucas*, 146 Ariz. 597, 607, 708 P.2d 81, 91 (1985).[FN3]

> FN3. Doody urges this court to adopt a *de novo* standard of review, arguing that the audio tapes of Doody's complete interrogation provide us the same ability as the trial court

possessed to evaluate the voluntariness of his confession. Determining the voluntariness of a confession is by nature an intensely factual inquiry, and we rely on the trial court's assessment not only of tangible evidence reproducible on appeal, but intangible evidence, including the credibility of witness testimony. *See State v. Chapple,* 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n. 18 (1983). Here, the officers who questioned Doody testified at the suppression hearing that Doody understood the *Miranda* warnings and that he remained alert and responsive throughout the extended interrogation. Only the trial judge could evaluate the impact and credibility of the officers' testimony, and we will not substitute our judgment for that of the trial court absent clear error.

A.

Doody argues that the trial court should have suppressed his statements because the officers coerced him to confess. In Arizona, confessions are presumed to be involuntary, and the state must establish by a preponderance of the evidence that a defendant confessed voluntarily and freely. *State v. LaGrand,* 153 Ariz. 21, 26, 734 P.2d 563, 568, *cert. denied,* 484 U.S. 872, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). In assessing the voluntariness of a confession, we "look to the totality of the circumstances surrounding the confession and determine whether the will of the defendant has been overborne." *State v. Lopez,* 174 Ariz. 131, 137,

847 P.2d 1078, 1084 (1992), *cert. denied*, 510 U.S. 894, 114 S.Ct. 258, 126 L.Ed.2d 210 (1993). With respect to juvenile confessions,

> the "greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." Thus, we evaluate whether police conduct was coercive in the context of a juvenile confession by carefully scrutinizing not only the external circumstances under which the juvenile was questioned but also the juvenile's reasonably apparent cognitive abilities. We also consider other inherently coercive factors in the totality: the arguably coercive atmosphere of the police interrogation room; the focus of the investigation on defendant as the prime suspect; and police transportation to the station.

State v. Jimenez, 165 Ariz. 444, 449, 799 P.2d 785, 790 (1990) (citations omitted).

The trial court considered the factors set forth in *Jimenez*. At the time of questioning, Doody was seventeen and one-half years old and completing his junior year in high school. Doody told the officers that he maintained a B grade average. Doody participated in his high school honor guard and color guard and held a job at the Luke Air Force Base commissary. Doody spoke fluent, although lightly accented, English. Doody gave no indication of any mental disorder.[FN4] The trial court also considered the external circumstances of the interrogation,

specifically the time and duration of the interrogation, and concluded that, in light of the officers' testimony regarding Doody's demeanor and the court's own review of the audio tapes, the circumstances surrounding the interrogation did not warrant suppression.

> FN4. On appeal, Doody points to evidence presented at the sentencing proceedings concerning his background and communication skills. We limit our review of the admissibility of Doody's confession to the evidence before the trial court at the suppression hearing. *State v. Flower,* 161 Ariz. 283, 286 n. 1, 778 P.2d 1179, 1182 n. 1 (1989).

Doody argues that the length of the interrogation, which began in the evening and continued for almost thirteen hours without significant breaks, indicates that he did not confess voluntarily. We consider the length of an interrogation in determining voluntariness particularly when, as is true here, the interview continues for a long period of time. However, the troublesome length of Doody's questioning does not, in itself, establish that the officers overcame Doody's will to resist confessing. *See State v. Taylor,* 112 Ariz. 68, 81, 537 P.2d 938, 951 (1975), *cert. denied,* 424 U.S. 921, 96 S.Ct. 1127, 47 L.Ed.2d 328 (1976) (characterizing seven-hour interrogation as "long" but upholding the statements as voluntary in the absence of evidence that a lack of food and sleep contributed to the statements). Other factors indicate that, despite the length of the interrogation, Doody confessed voluntarily. Although

the entire interrogation lasted approximately thirteen hours, Doody admitted he had borrowed Caratachea's rifle at the time of the temple murders after approximately two and one-half hours of questioning. Doody admitted he had participated in the temple robbery after approximately six and one-half hours of questioning, and his description of the events at the temple spanned nearly two hours. During the remaining hours, the detectives reviewed Doody's testimony and probed for a connection to the Tucson Four.

Although Doody characterizes the tone of the interrogation as coercive, the audio tapes reveal a courteous, almost pleading style of questioning during most of the interview. Each of the officers involved in the interrogation testified at the suppression hearing that Doody remained alert and responsive throughout the interrogation and did not appear overtired or distraught. Our review of the audio tapes confirms the officers' testimony. Because Doody exercised his right not to testify at the suppression hearing, neither the trial judge nor this court has any basis for assuming that he would have contradicted the officers' testimony. The record, both at the time of the suppression hearing and after trial, includes no evidence that calls into question the testimony that Doody remained alert and responsive. Moreover, both before and during the interrogation, the officers offered Doody food and drinks and accommodated his requests to use the restroom. For those reasons, we conclude that the length of Doody's interrogation, in itself, does not mandate a finding of involuntariness.

Doody argues further that the trial court should have suppressed his statements because he did not have a parent or guardian present at the interrogation. We consider whether a parent is present during the questioning of a juvenile in evaluating voluntariness, but a parent's absence does not, in itself, render a confession involuntary. *State v. Hardy,* 107 Ariz. 583, 584, 491 P.2d 17, 18 (1971). Moreover, the absence of a parent weighs less heavily when, as here, the juvenile has not requested a parent or other adult. *Jimenez,* 165 Ariz. at 452, 799 P.2d at 793. At the outset of the interrogation, detectives asked Doody whether he wanted to have his parents present during questioning. Doody responded that he did not care whether his parents were present and thereafter agreed to speak with the detectives alone. [FN5] In light of Doody's age and his specific consent to speak with the officers without his parents, we reject Doody's argument that the absence of a parent renders his confession inadmissible.

> FN5. Doody argues on appeal that the officers took extraordinary steps to ensure that his father would not be available during the interrogation. At the outset of the interrogation, Doody specifically declined to have his parents present and did not request that they be contacted at any point during the questioning. Thus, whether the state acted to prevent Doody's father from attending the interrogation could not have affected the voluntariness of Doody's statements.

Bearing in mind Doody's individual characteristics and the external circumstances of the interrogation, we turn to the conduct of the police in obtaining Doody's confession. To be voluntary, a confession must not be induced by threats or promises of benefit or leniency, no matter how slight. *State v. Williams,* 136 Ariz. 52, 56, 664 P.2d 202, 206 (1983). Doody argues that the officers elicited his confession improperly by promising not to divulge his statements to the other suspects. We disagree. "Before a statement will be considered involuntary because of a 'promise,' evidence must be established that (1) a promise of benefit or leniency was in fact made, and (2) the suspect relied on that promise in making the statement." *Lopez,* 174 Ariz. at 138, 847 P.2d at 1085 (citing *State v. Amaya-Ruiz,* 166 Ariz. 152, 165, 800 P.2d 1260, 1273 (1990), *cert. denied,* 500 U.S. 929, 111 S.Ct. 2044, 114 L.Ed.2d 129 (1991)).

Applying the test set forth in *Lopez* and *Amaya-Ruiz,* we reject Doody's argument for two reasons. First, the detectives' statements did not constitute a "promise" because they "did not offer any benefit to the defendant in exchange for information." *State v. Hensley,* 137 Ariz. 80, 87, 669 P.2d 58, 65 (1983) (statement by officer that suspect's confession would not be admissible in court did not constitute a promise); *see Lopez,* 174 Ariz. at 138, 847 P.2d at 1085 (statement by officer that he would not play interrogation tapes for victim's mother did not constitute a promise). The trial court found, and we agree, that the officers assured Doody that his statements would not be disclosed to the other

suspects because the officers believed Doody's fear of reprisal affected his willingness to talk. The detectives did not imply that the state would not prosecute Doody if he revealed the information or that the state would not use his statements against him in a subsequent prosecution. *See State v. Burr,* 126 Ariz. 338, 340, 615 P.2d 635, 637 (1980). Second, Doody fails to establish that he relied on the statements in confessing. *See Amaya-Ruiz,* 166 Ariz. at 165, 800 P.2d at 1273; *see also Utah v. Strain,* 779 P.2d 221, 227 (Utah 1989) (recognizing that, under totality of circumstances test, a threat or promise does not render confession inadmissible absent reliance). For those reasons, we conclude that the trial court did not err in determining that "the statements by law enforcement that what defendant Doody said would not be told to others ... were not sufficiently compelling to overcome defendant Doody's will to resist confessing."

We also reject Doody's argument that the officers unfairly pressured him to confess. The officers used a variety of approaches in questioning Doody. They emphasized Doody's experience in the high school honor guard and color guard and appealed to his sense of honor as a soldier. At impasses in the interview, the police captain entered the interrogation room and likened himself to a commanding officer in the military, encouraging Doody to trust and confide in him. The officers feigned empathy with Doody's situation and pleaded with Doody to prove his innocence. The officers also indicated to Doody that other suspects had implicated him in the temple murders and that

Doody's best defense would be to explain his version of the events.

In *State v. Carrillo,* 156 Ariz. 125, 750 P.2d 883 (1988), the court addressed the propriety of deceptive interrogation tactics:

> The very nature of law enforcement encourages police to use some artifice and trickery in their work. *Miranda* curtailed many of the most egregious practices, such as the infamous "third degree." However, courts still tolerate some police gamesmanship, *so long as the games do not overcome a suspect's will and induce a confession not truly voluntary.*

Id. at 136, 750 P.2d at 894 (emphasis added) (citations omitted). The trial court correctly characterized portions of Doody's interrogation as "aggressive, energetic [and] forceful" but concluded that "the method and style used by law enforcement in questioning defendant Doody was permissible, i.e., lawful...." We agree. The officers conducting Doody's interrogation made no improper promises or threats and, although Doody did not speak for long periods during the interrogation, he never invoked his right to remain silent or his right to an attorney. The tactics, though deceptive in part, were not so egregious as to overcome Doody's will and, as discussed above, the record contradicts Doody's claim on appeal that the method of interrogation induced him to confess. With respect to the officers' statements that Doody's best defense would be to explain his involvement in the temple murders

before the other suspects placed primary blame on him, we note that " [a]dvice to tell the truth, unaccompanied by either a threat or promise, does not make a confession involuntary." *State v. Ross,* 180 Ariz. 598, 603, 886 P.2d 1354, 1359 (1994), *cert. denied,* 516 U.S. 878, 116 S.Ct. 210, 133 L.Ed.2d 142 (1995).

For these reasons, we conclude that the trial court did not abuse its discretion by admitting Doody's confession. Moreover, the trial court's decision to admit the confession did not constitute the final determination of voluntariness. In this case, as in all others, the jury was "the ultimate arbiter of voluntariness, and [was] free, in effect, [to] disagree with the judge, and reject the confession." *State v. Gretzler,* 126 Ariz. 60, 84, 612 P.2d 1023, 1047 (1980) (quotation omitted). The trial judge instructed the jury that Doody's statement was not voluntary if it resulted from his "will being overcome by a law enforcement officer's use of any sort of violence, coercion, or threats, or by any direct or implied promise, however slight." The judge told the jury to give Doody's statement whatever weight it deserved under all the circumstances. Following those instructions, the jury either found the confession voluntary and gave it appropriate weight or convicted Doody on the basis of other evidence.

B.

Doody also argues that the trial court should have suppressed his confession because the officers did not inform him sufficiently of his rights before

questioning him. To be admissible, "a confession must not only be free from coercion, but the defendant's waiver of his constitutional rights must be knowing and intelligent." *Jimenez,* 165 Ariz. at 449, 799 P.2d at 790. The Arizona Rules of Procedure for the Juvenile Court govern the admissibility of juvenile confessions, including statements made by a juvenile later charged as an adult:

> No extra-judicial statement to a peace officer by the child shall be admitted into evidence in juvenile court over objection unless the person offering the statement demonstrates to the satisfaction of the court that: The statement was voluntary and before making the statement the child was informed and intelligently comprehended that he need not make a statement, that any statement made might be used in a court proceeding, and that he had a right to consult with counsel prior to making a statement and during the taking of the statement, and that, if he or his parents, guardian or custodian could not afford an attorney, the court would appoint one for him prior to any questioning.

Ariz. R. Juv. Ct. P. 18; *see Jimenez,* 165 Ariz. at 450, 799 P.2d at 791. We determine whether extra-judicial statements resulted from a knowing and intelligent waiver of rights by considering whether, in light of the totality of circumstances, the officers "imparted a clear, understandable warning of all defendant's rights ... in language the defendant could comprehend and on which he could intelligently act." *State v. Mumbaugh,* 107 Ariz. 589, 597, 491 P.2d 443, 451 (1971).

The state initially argues that Doody waived his claim of error with respect to the adequacy of the *Miranda* warnings because he did not challenge the trial court's finding that he was not in custody. *See id.* at 593, 491 P.2d at 447 (explaining that, although warnings must precede custodial interrogations, no warnings are necessary for non-custodial questioning because "[w]here [a] defendant is not in custody or deprived of his freedom his answers are not deemed compelled....").

The state's waiver argument relies on an overbroad reading of the trial court's findings. The trial court's factual findings resolved only the limited issue that Doody "was not under arrest or in custody *when he was transported to the task force offices for questioning* on October 25, 1991." Contrary to the state's assertion, the trial court did not address whether Doody was in custody during the interrogation. Doody's failure to challenge the trial court's narrow finding that he was not in custody prior to the interview does not constitute a waiver of his argument that the officers failed to advise him sufficiently of his rights before obtaining his inculpatory statements. For purposes of review, we accept Doody's characterization of the questioning as a custodial interrogation requiring *Miranda* warnings.

Again considering the circumstances in their totality, we conclude that the trial court did not err in determining that the officers advised Doody of his *Miranda* rights in a clear and understandable

manner and that Doody made a knowing and intelligent waiver. At the outset of the interrogation, the officers advised Doody of his rights under *Miranda* and of his right to have a parent or guardian present during questioning. The officers also advised Doody of the possibility he later could be transferred to adult court. The officers read each warning from a standard juvenile form and provided additional explanations as appropriate. After reading each warning, the officers asked Doody if he understood the right involved and obtained his initials on the form. Although Doody had no prior experience with the criminal justice system, the officers explained the rights in a manner appropriate for his age and apparent intelligence.

The officers testified at the suppression hearing that Doody appeared to understand the warnings and exhibited no signs of doubt or confusion. Based on that testimony and the court's review of the taped interrogation, the trial court concluded that the officers adequately advised Doody of his rights and obtained an appropriate waiver before continuing. In so holding, the trial court expressly considered Doody's age, intelligence, and lack of prior exposure to the criminal justice system. Our review of the record, including the audio tape of the warnings, supports the trial court's finding that Doody knowingly and intelligently waived his rights, and therefore we will not disturb the court's ruling.

III.

Doody next challenges the trial court's evidentiary

rulings pertaining to testimony from the Tucson Four. Doody argues that the trial court erred by permitting him to present the confessions of the Tucson Four only to establish and argue the truth of their confessions. Had he not been so limited, Doody asserts, he could have presented evidence of improprieties in the Tucson Four interrogations and could have proved and argued that his own confession, which he attributes to "the same police officers using many of the same interrogation techniques," was false, as were the Tucson Four confessions. Doody's argument on appeal that testimony from and confessions by the Tucson Four were admissible to show his confession was involuntary, however, is not only different from but also inconsistent with the basis on which Doody urged their admissibility in the trial court. Because a party may not assert an evidentiary theory for the first time on appeal, *State v. Serna*, 163 Ariz. 260, 267, 787 P.2d 1056, 1063 (1990), we reject this argument.

The question whether Doody could use the Tucson Four confessions first arose in the context of a motion in limine through which the state sought to preclude the defense from using statements by the Tucson Four. The state, not Doody, argued the Tucson Four statements should be excluded as unreliable and irrelevant. In response, Doody asserted the statements were relevant to his defense that the Tucson Four, not Doody, committed the temple murders and that a reasonable person could believe their confessions to be true. Doody gave no indication whatever that he intended to use the statements to

establish that, because the Tucson Four confessions were not reliable, Doody's admissions also were not reliable. Moreover, as is self-evident, such an argument would have been inconsistent with the basis on which Doody had argued the trial court should admit the statements.

After hearing argument, the trial court agreed with Doody. The court first found the statements clearly relevant to whether the Tucson Four or Doody committed the temple murders and then weighed the probative value against the prejudicial effect of the statements. Commenting that the jury would determine the credibility and voluntariness of the Tucson Four statements, the court determined that the statements would be admissible if the declarants were unavailable at trial.

Two of the Tucson Four, Mark Nunez and Leo Bruce, testified for Doody. Defense counsel questioned Nunez about the circumstances of his arrest and interrogation. During argument in chambers, Doody justified his examination into these areas by stating that he had two reasons for presenting the information. First, he wanted the jury to understand that the defense was presenting the full story, which he thought would add to the credibility of the defense. Second, since the prosecution intended to argue that the statements were unreliable, Doody wanted to "draw the sting." As had been true during earlier proceedings, Doody did not assert any intention of drawing parallels between the Tucson Four and the Doody interrogations.

Both Doody and the prosecution then questioned Nunez and Bruce extensively about the circumstances surrounding their interrogations and the content of their confessions. After the court found that Michael McGraw and Dante Parker, the remaining members of the Tucson Four, were unavailable as witnesses, the jury heard the audio recording of Parker's questioning and the court admitted into evidence McGraw's statement.

During a conference among the trial judge and lawyers, held outside the presence of the jury several days after the Tucson Four testimony ended, Doody asserted that, if the prosecution intended to suggest that Doody's confession was reliable because the officers had discontinued the abusive practices used in the Tucson Four interrogations, the trial court should allow Doody to present evidence of "continuing abuses and similarities" in his own interrogation. At that point, the trial court commented that what occurred in the Tucson Four case was not relevant to the validity of Doody's statements. The court emphasized, as it had on several other occasions, that Doody could present to the jury any evidence related to his confession that would render it unreliable, including all the circumstances surrounding his confession.

Doody now asserts that the trial court, by foreclosing an argument that his confession, like those of the Tucson Four, was false, violated the principles set forth in *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). We reject Doody's argument for several reasons. First, *Crane* does not

apply. There, the Court held that a trial court may not exclude evidence concerning the manner in which the police obtain a defendant's confession because the environment that yields a confession bears on its reliability. *Id.* at 689, 106 S.Ct. at 2146. The trial court here fully complied with that holding. The jury heard the audio tapes of Doody's entire interrogation. All officers involved in taking his statement testified. The trial court excluded no evidence concerning the manner in which the police obtained Doody's confession. Moreover, contrary to Doody's statements on appeal, the trial court permitted Doody to present substantial evidence about the circumstances surrounding the interrogations of the Tucson Four. As noted above, two of the Tucson Four testified extensively about their interrogations, and the jury heard the tape of a third interrogation. Doody made no offer of proof as to any additional evidence he wanted to introduce with respect to the circumstances surrounding the Tucson Four confessions, and therefore provides no basis for further review by this court. *See* Ariz. R. Evid. 103(a); *see also Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 129, 700 P.2d 819, 827, *cert. denied*, 474 U.S. 948, 106 S.Ct. 314, 88 L.Ed.2d 295 (1985).

Second, Doody failed to preserve for appeal the issue whether the trial court should have admitted Tucson Four evidence as relevant to establish the truth or falsity of Doody's confession. Arizona, like most other jurisdictions, has never held that showing the police obtained a false or involuntary confession from one defendant proves whether a second defendant's confession is false or involuntary. Assuming, without

deciding, that substantial similarity of circumstances, interrogators, and defendants could render the voluntariness of one confession relevant to the issue of another confession's voluntariness, we find that Doody made no such showing in this case. Doody cites to no portion of the record, and our own review has disclosed none, in which he identified for the trial court the similarities between his interrogation and those of the Tucson Four that he now regards as sufficient to support his argument that the truthfulness of one is probative of the truthfulness of the other. Indeed, the record does not support even those general references Doody makes on appeal. For instance, although Doody categorically states on appeal that his confession was "obtained by the same police officers using many of the same interrogation techniques" used with the Tucson Four, the record discloses substantial differences in approach and questioners. Doody also made no offer of proof describing the evidence he would offer to establish a link between interrogation techniques and falsity of statements.

Doody's averments to the court that he intended to present the Tucson Four evidence to establish the truth of their confessions, his failure to offer the Tucson Four evidence for the purpose of proving the falsity of his confession, and his failure to define which similarities he regarded as providing sufficient basis for comparing the confessions, lead us to conclude that Doody waived this argument on appeal.

IV.

Doody next argues that the trial court erred by restricting his cross-examination of Garcia with respect to unrelated crimes Garcia committed before and after the temple murders. Although the right to cross-examine a witness is vital to the right of confrontation, the trial court reserves discretion to curtail the scope of cross-examination to within "reasonable" limits. *State v. Fleming,* 117 Ariz. 122, 125, 571 P.2d 268, 271 (1977). We review a trial court's order restricting the scope of cross-examination on a case-by-case basis to determine whether the court unduly inhibited the defendant's ability to present information bearing on issues or on the credibility of witnesses. *Id.* The trial court exercises considerable discretion in determining the proper extent of cross-examination, and we will not disturb the court's ruling absent a clear showing of prejudice. *State v. Rodgers,* 134 Ariz. 296, 301, 655 P.2d 1348, 1353 (App.1982).

Doody contends that the trial court improperly prohibited him from cross-examining Garcia about the details of the Cameron murder. Doody argued at trial that the details of the Cameron murder illustrated Garcia's motive and bias because, due to the aggravating factors of the Cameron murder, Garcia would have received the death penalty for that crime. If the details of the Cameron murder were admitted, Doody asserted, the evidence would demonstrate the extent of the benefit Garcia received under the terms of his plea agreement, which prohibited imposition of the death penalty. The court

correctly rejected the introduction of the Cameron murder evidence, however, because the circumstances surrounding the Cameron murder were relevant only to whether a trial judge would have imposed the death penalty in a separate trial for that crime. *See* A.R.S. § 13-703. The trial court allowed Doody to illuminate the full extent of the benefit Garcia received by agreeing to testify against Doody. Graphic details of the Cameron murder would have added nothing of relevance to establish Garcia's motive or bias, and the trial court did not abuse its discretion by limiting Doody's cross-examination as to the details of the Cameron murder.

Doody next argues that the trial court erroneously prohibited him from cross-examining Garcia about the Cruz offenses. At trial, Doody argued that evidence disclosing the details of the Cruz offenses would further illustrate the benefit Garcia received under his plea agreement because, although the plea agreement did not encompass the Cruz offenses, Garcia may have anticipated that the state would not prosecute him for those crimes in exchange for his testimony against Doody. Again, the trial court allowed Doody to question Garcia regarding the benefits he anticipated as part of his plea agreement, including whether he believed he would be exempt from prosecution for the Cruz offenses. As with the Cameron murder, the details of the Cruz offenses would have added nothing relevant to Garcia's motive or bias. We therefore affirm the court's ruling.

Doody also argues that the trial court should have

allowed him to cross-examine Garcia about the Cruz offenses and other burglaries Garcia committed with Caratachea to impeach Garcia's character for truthfulness. Doody did not argue impeachment as a basis for admissibility, however, until this appeal. At trial, Doody argued only that evidence of past conduct involving Garcia and Caratachea was admissible to prove that Caratachea participated in the temple murders. The trial court correctly rejected Doody's proposed evidence as irrelevant, unduly prejudicial, and inadmissible under Rule 404(b) of the Arizona Rules of Evidence.

This court generally does not review evidentiary theories raised for the first time on appeal. *Serna*, 163 Ariz. at 267, 787 P.2d at 1063. In any event, we find no merit to impeachment as a basis for cross-examining Garcia regarding the Cruz offenses or the burglaries. On cross-examination, a party may inquire into specific instances of a witness's prior conduct for impeachment purposes only if the conduct is probative of the witness's character for truthfulness. Ariz. R. Evid. 608(b); *State v. Woods*, 141 Ariz. 446, 449, 687 P.2d 1201, 1204 (1984). Because Doody provides no support for his assertion that Garcia's past conduct bears any relation to his character for truthfulness, we find no error in the court's limitation of his cross-examination.

Doody argues alternatively that evidence of Garcia's past conduct with Caratachea establishes Garcia's motive and bias to implicate Doody and exculpate Caratachea in the temple murders. Doody also did not assert motive or bias as a basis for admissibility

during trial proceedings and, as stated above, failure to argue an evidentiary theory in the trial court constitutes a waiver on appeal. *Serna,* 163 Ariz. at 267, 787 P.2d at 1063. Moreover, we find no merit in Doody's argument that Garcia's history of criminal activity with Caratachea influenced Garcia to favor Caratachea over Doody, given the fact that Doody also allegedly participated in at least some of the criminal activity.[FN6]

FN6. In support of his claim of error, Doody relies upon *United States v. Robinson,* 530 F.2d 1076 (D.C.Cir.1976). That decision recognizes that a trial court exercises discretion in deciding whether to permit cross-examination concerning other criminal activities to establish a witness's bias or motive to lie. In *Robinson,* the court merely concluded that the trial court did not abuse its discretion in admitting such evidence, after balancing the probative value against the prejudicial effect of the evidence. Moreover, the evidence at issue in *Robinson* involved "an ongoing affair related in subject matter and time to the transactions charged against defendant." *Id.* at 1081. In contrast, no direct connection exists between the temple murders and the other offenses involving Garcia and Caratachea. Under these circumstances, the trial court did not abuse its discretion in rejecting Doody's attempt to cross-examine Garcia about other uncharged criminal offenses.

Doody also argues that the trial court erred by prohibiting him from establishing that Garcia had used the phrase "no witnesses" in connection with the Cameron murder. We find the limitation falls well within the trial court's discretion. Doody maintains that Garcia's use of the phrase "no witnesses" in the Cameron murder, which occurred shortly after the temple murders, supports the proposition that Garcia, rather than Doody, executed the temple victims so that "no witnesses" would remain. However, the trial court allowed Doody to question Garcia about his use of the phrase "no witnesses," and Garcia acknowledged at trial that he had used the phrase "no witnesses" after the temple murders. Moreover, Doody makes no showing of prejudice stemming from the court's limitation on his ability to link Garcia's use of the phrase "no witnesses" specifically to the Cameron murder. If any error occurred, it was harmless and provides no basis for reversal.

V.

Doody next contends that the trial court erroneously permitted Caratachea to invoke his right to remain silent.[FN7] Doody argues that Caratachea waived his right by testifying under oath at Doody's juvenile transfer hearing. We disagree.

FN7. U.S. Const. amend. V.

A waiver of the fifth amendment privilege affects only the particular proceeding in which the waiver occurs. *Nelson v. Hannah,* 122 Ariz. 296, 297, 594

P.2d 550, 551 (App.1979) (citing *Ottomano v. United States,* 468 F.2d 269 (1st Cir.1972), *cert. denied,* 409 U.S. 1128, 93 S.Ct. 948, 35 L.Ed.2d 260 (1973)). Caratachea's waiver of his fifth amendment right at the juvenile transfer hearing, a proceeding separate from the trial, did not constitute a waiver of his right to refuse to testify at trial. *See United States v. Licavoli,* 604 F.2d 613, 623 (9th Cir.1979), *cert. denied,* 446 U.S. 935, 100 S.Ct. 2151, 64 L.Ed.2d 787 (1980) (holding that a witness may invoke the privilege against self-incrimination at trial despite testifying previously before a grand jury in the same case). Juvenile transfer hearings, like grand jury proceedings, determine whether further proceedings are appropriate; the testimony of a witness at a juvenile transfer hearing, like testimony at a grand jury proceeding, does not compromise the witness's later right to refuse to testify at trial in the same case.

Doody argues alternatively that Caratachea could claim no fifth amendment privilege with respect to certain burglaries for which he already had been adjudicated and that the trial court therefore should have required him to invoke his fifth amendment privilege with respect to his involvement in the temple murders in the presence of the jury. We disagree. In *State v. McDaniel,* 136 Ariz. 188, 665 P.2d 70 (1983), the court held that if "a witness could legitimately refuse to answer essentially all relevant questions, then that witness may be totally excused without violating an individual's Sixth Amendment right to compulsory process." *Id.* at 194, 665 P.2d at 76. Here, the trial court disallowed evidence

concerning Caratachea's previously adjudicated burglaries on the basis of relevance. *McDaniel* supports the trial court's decision because Caratachea legitimately could refuse to answer all *relevant* questions and therefore could be excused from invoking his right in front of the jury. Because Doody offers no convincing argument to establish the relevance of those burglaries, we find no error.

Doody further argues that the trial court erred in redacting Caratachea's prior testimony to eliminate references to Caratachea's prior crimes and misconduct. Doody contends that the trial court should have admitted evidence of Caratachea's criminal history for impeachment purposes. On appeal, Doody states that "Doody's counsel argued vigorously that it was improper to excise from Caratachea's prior testimony references to his myriad of other crimes, conduct with which Caratachea had been impeached by both the state and the defendant when he originally gave that testimony." The only citation to the record Doody provides refers this court to the transcript of Caratachea's prior testimony as redacted. Failure to provide citation to the record in support of an argument, as required by Rule 10(c)(1) of the Arizona Rules of Criminal Appellate Procedure, justifies this court in disregarding the argument. However, we have independently reviewed the objections Doody made to redaction. At no point did Doody object to the redaction of Caratachea's testimony regarding Caratachea's prior conduct on the basis that he wished to use the evidence for impeachment. Failure to preserve impeachment as a basis for admissibility

waives the issue on appeal. *See Serna,* 163 Ariz. at 267, 787 P.2d at 1063.

Finally, Doody argues that the trial court erred in permitting the state to withhold immunity from Caratachea while granting immunity to several prosecution witnesses. The state exercises sole discretion in granting immunity to witnesses. *State v. Fisher,* 141 Ariz. 227, 243, 686 P.2d 750, 766, *cert. denied,* 469 U.S. 1066, 105 S.Ct. 548, 83 L.Ed.2d 436 (1984). The state's refusal to grant a particular witness immunity does not violate a defendant's right to due process absent prosecutorial misconduct or, alternatively, a showing that the witness would present clearly exculpatory evidence and that the state has no strong interest in withholding immunity. *State v. Axley,* 132 Ariz. 383, 388, 646 P.2d 268, 273 (1982). Neither of those exceptions applies here, and we find no error.

VI.

Doody argues next that the trial court erred in its evidentiary rulings excluding testimony from James Herron. Prior to trial, Herron gave a sworn statement to investigators, in which he recounted conversations with Caratachea while they were in juvenile detention together. In the statement, Herron claimed that Caratachea had told him that Garcia, not Doody, shot the victims and that Doody believed he was participating in a war game at the temple. Herron also stated that Caratachea had boasted that his autograph would be valuable some day because of his involvement in the temple murders. Herron

provided the officers a slip of paper bearing Caratachea's signature as proof of the conversations. After Herron repeated his statements in a pretrial defense interview, Doody subpoenaed Herron to testify at trial. Herron failed to appear pursuant to the subpoena, however, and the trial court ruled that his sworn statement constituted inadmissible hearsay.

Herron's sworn statement contains two layers of hearsay, Caratachea's statements to Herron and Herron's statements to the investigators. We will uphold the trial court's exclusion of the sworn statement if either level fails to qualify for admission as an exception to the hearsay rule. *See* Ariz. R. Evid. 805; *State v. McGann,* 132 Ariz. 296, 298 n. 1, 645 P.2d 811, 813 n. 1 (1982). Doody argues that the exception for statements against interest applies to Caratachea's statements to Herron and that the residual hearsay exception for unavailable witnesses applies to Herron's sworn statement to the investigators.

The exception for statements against interest, set forth in Rule 804(b)(3), creates an exception for

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. *A statement tending to expose the declarant to*

> *criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.*

Ariz. R. Evid. 804(b)(3) (emphasis added). Because Caratachea's statements to Herron implicated him in the temple murders and were offered to exculpate Doody, the statements are inadmissible unless corroborating circumstances ensure the statements' trustworthiness.

In *State v. Lopez*, 159 Ariz. 52, 764 P.2d 1111 (1988), the court defined the standard for assessing the admissibility of a statement against interest:

> The trial judge should examine both the corroborating evidence and the contradictory evidence. The judge's inquiry should be limited to the question of "whether evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true." If the judge determines that a reasonable person could conclude that the statement could be true, the evidence comes in for the jury's consideration.

Id. at 54-55, 764 P.2d at 1113-14 (citations omitted) (quoting *LaGrand*, 153 Ariz. at 27, 734 P.2d at 569). Here, Caratachea's signature provides the only evidence corroborating his statements to Herron. At best, the signature corroborates that a conversation between Caratachea and Herron occurred; the signature provides little corroboration for the

substance of the conversation. Moreover, even if we were to regard the signature as providing the necessary corroboration to render Caratachea's statements to Herron admissible, the trial court correctly excluded Herron's account of Caratachea's statements, the outer layer of hearsay, as inadmissible.

Doody concedes that Herron's sworn statement summarizing his conversations with Caratachea fails to qualify for admission as former testimony under Rule 804(b)(1). Doody argues, however, that the trial court should have admitted Herron's sworn statement under the residual hearsay exception for unavailable witnesses, set forth in Rule 804(b)(5). The "catch-all" provision of Rule 804(b)(5) provides an exception for statements not covered by an established hearsay exception but "having equivalent circumstantial guarantees of trustworthiness...." Ariz. R. Evid. 804(b)(5). Thus, a statement proffered pursuant to Rule 804(b)(5) must have "particularized guarantees of trustworthiness" that the statement is "at least as reliable as evidence admitted under a firmly rooted hearsay exception." *State v. Luzanilla*, 179 Ariz. 391, 394, 880 P.2d 611, 614 (1994), *cert. denied*, 514 U.S. 1039, 115 S.Ct. 1406, 131 L.Ed.2d 293 (1995). To assess whether a statement bears the requisite indicia of trustworthiness, the trial court "may not consider corroborating evidence, but must instead look to 'the totality of circumstances ... that surround the making of the statement and that render the declarant particularly worthy of belief.' " *Id.* (quoting *Idaho v. Wright*, 497 U.S. 805, 819, 110 S.Ct. 3139, 3148, 111 L.Ed.2d 638 (1990)).

Doody sets forth the following factors as indicative of the sworn statement's reliability: (1) Herron made the statement voluntarily and under oath, (2) Herron did not know Doody and therefore had no motive to lie, (3) Herron's statement was taken by police officers and recorded by a court reporter, and (4) Herron made similar statements in other interviews. However, other factors cast doubt on the reliability of Herron's statement.

The trial court reviewed sealed documents describing Herron's mental condition and juvenile record, which related to his credibility. Although Herron made his statement under oath, "giving an oath prior to testifying, in and of itself, is not a circumstance making it highly unlikely for a person to lie-at least so unlikely that cross-examination would add little." *Luzanilla,* 179 Ariz. at 394-95, 880 P.2d at 614-15. Considering all the circumstances surrounding Herron's sworn statement, we find no error in the trial court's conclusion that Doody failed to make the requisite showing of reliability. Additionally, Herron's sworn statement does not constitute the type of rare or exceptional evidence contemplated by Rule 804(b)(5). *See id.* at 398, 880 P.2d at 618 (explaining that evidence "generally admissible under Rule 804(b)(1) but for its missing element" is not the type of evidence for which Rule 804(b)(5) provides an exception to the hearsay rule). For those reasons, we conclude that the trial court properly excluded Herron's sworn statement as inadmissible hearsay.

Doody next challenges the trial court's refusal to reopen the trial to accept Herron's testimony. Following closing arguments, the trial court heard, through several layers of informants, that Herron may have agreed to surrender the next day. The court nevertheless proceeded to instruct the jury. When Herron later arrived at the court, Doody moved to reopen his case to present Herron's testimony. The trial court denied Doody's motion.

The trial court exercises its discretion in evaluating a motion to reopen. *State v. Thomas*, 110 Ariz. 120, 131, 515 P.2d 865, 876 (1973). In deciding whether to reopen, the trial court should consider whether "all the evidence, offered in good faith and necessary to the ends of justice has been heard." *State v. Mendoza*, 109 Ariz. 445, 448, 511 P.2d 627, 630 (1973) (quoting *State v. Favors*, 92 Ariz. 147, 149, 375 P.2d 260, 261 (1962)). We find no abuse of discretion in the trial court's decision not to reopen.

As discussed above, the subject of Herron's proposed testimony, Caratachea's statements, may well have constituted inadmissible hearsay. Even if admissible, Herron's testimony had little probative value. In his statement, Herron claimed that Caratachea told him that Doody believed he was playing a war game. However, Herron then clarified that Caratachea said that the war game included robbing the temple. Herron's statement also indicated that Doody was not tricked into participating in the events at the temple, as Doody claimed. In ruling against reopening, the trial court considered the attenuated nature of the proposed evidence, weighed against the

prejudicial effect of allowing more testimony to be heard and conducting additional closing arguments, coupled with the suspicious timing of Herron's arrival. The trial court was in a far better position than are we to determine the impact on the jury of reopening the trial, after closing arguments and instructions, for testimony from one witness. In light of the court's concerns, we cannot conclude that the trial court's decision constituted clear and manifest error.

Further, because the jury rejected the premeditated murder charges, any error in failing to reopen the case to accept Herron's testimony constitutes harmless error. Error is harmless "if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993), *cert. denied*, 511 U.S. 1046, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994). At best, Herron's testimony would have established that Doody believed he was participating in a war game to rob the temple, which may have negated premeditation. Herron's testimony, however, directly inculpated Doody on the charges of felony murder, the basis on which he was convicted. If Herron had testified, the effect would have been to strengthen the felony murder evidence against Doody. We therefore conclude, beyond a reasonable doubt, that the alleged error did not contribute to or affect the verdict.

VII.

For the reasons stated above, we affirm Doody's

convictions and sentences.

WEISBERG, P.J., and TOCI, J., concur.
Ariz.App. Div. 1, 1996.
State v. Doody
187 Ariz. 363, 930 P.2d 440

APPENDIX D

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

Received	Processed
Nov.20 '92	Nov. 23 '92
Clerk of the Court	Dist. Center

Clerk of the Court

November 19, 1992 HONORABLE GREGORY H. MARTIN
Y.Allen
Deputy Clerk

No. CR 92-01232 and CR 92-02096

	County Attorney
STATE OF ARIZONA	By: Myrna Parker
	By: K.C. Scull
v.	By: Paul Ahler
JONATHAN ANDREW DOODY	Peter S. Balken

CR 92-02096

STATE OF ARIZONA

v.

ALESSANDRO GARCIA	Luis Calvo
	Victim Witness Division

The Court has had under advisement the

defendants' motions to suppress their statements given to law enforcement. The Court has read the pleadings and considered the evidence adduced at the evidentiary hearing and the arguments of counsel.

With respect to defendant Doody, the issue appears to the Court to be whether the defendant's will to resist confessing was overborne by the law enforcement officials conducting the interrogation. Regarding defendant Garcia, the issue appears to the Court to be whether the defendant's Miranda right to counsel was violated when the defendant invoked his right to counsel during the interrogation and then later confessed after further interrogation without counsel present.

With respect to defendant Doody, the evidence shows that on October 25, 1991, he was 17 years of age and, at the time, attending Agua Fria High School located in Maricopa County. Law enforcement had received recent information from sources that a gun which had been in the possession of both defendants at about the time of the murders at the Wat Promkunaram Buddhist Temple was identified as a weapon used in the murders. As a result, defendant Doody was contacted by law enforcement at his high school where he was attending a football game and asked if he would voluntarily accompany the officers to further discuss the subject matter of the weapon, which had been previously discussed between defendant Doody and law enforcement approximately a month and a half before. Defendant Doody agreed to do so and was taken down to task force headquarters in Phoenix. The questioning of defendant Doody began

at around 9:30 p.m. on October 25. The questioning of defendant Doody continued for approximately thirteen hours into the next day. A number of law enforcement officers participated in the questioning. Defendant Doody was advised of his Miranda rights at the outset of the process and was, from time to time, offered food, drink, and the opportunity to use the bathroom facilities. Defendant Doody, during the questioning, confessed to being involved in criminal conduct which resulted in the murders of the victims.

Defendant Doody contends that his incriminating statements were involuntary in that they were coerced by the conduct of the law enforcement officials while questioning him. The evidence, indeed, shows that at the beginning of the questioning, and, in fact, for several hours, defendant Doody did not confess. The evidence does show that defendant Doody did admit to being involved after approximately six and a half hours of questioning. The evidence shows that for much of the time, before defendant Doody did confess, law enforcement was imploring him to tell them what happened. The evidence tapes of the questioning indicate that many minutes went by when defendant Doody would be silent while the law enforcement officers practically pleaded with him to talk. The evidence is that law enforcement on many occasions told defendant Doody that what he told them would not, in effect, be told to others. In that regard, this Court concludes that law enforcement felt that defendant Doody had, perhaps, been threatened by others who might be involved in the murders and was reluctant to talk out of fear of reprisal. At that time, law enforcement was also

questioning other acquaintances of defendant Doody and had already arrested four individuals from Tucson.

As to this defendant, this Court finds that he was not under arrest or in custody when he was transported to the task force offices for questioning on October 25, 1991. Even though not in custody, law enforcement did advise defendant Doody of his Miranda rights in language that could, and, in fact, was, clearly understood by defendant Doody. This Court further finds that defendant Doody did knowingly, voluntarily, and intelligently give up his right to remain silent and to have an attorney or a parent present while being questioned and did agree to talk. In finding a valid waiver, the Court has considered defendant Doody's apparent intelligence and education, his age, his apparent sound physical and mental condition, and the fact that he had no previous contact with the criminal justice system.

Without a doubt, the law enforcement officers who were questioning defendant Doody wanted him to cooperate. The matching of the weapon thought to have been in the possession of the defendants with evidence at the murder scene was a major breakthrough in the investigation. Further, the Court believes that it would not be unfair or an overstatement to characterize the manner of questioning by law enforcement as aggressive, energetic, or forceful. The statements by law enforcement that what defendant Doody said would not be told to others, the Court reasons, were not sufficiently compelling to overcome defendant Doody's will to resist confessing. The purpose of questioning

defendant Doody was obvious: to discover anything he might know in connection with the murder of nine people. Defendant Doody was thought to have knowledge about circumstances concerning the crimes by virtue of him being in possession of a weapon involved in the killings around the time of the killings. This Court now resolves that the method and style used by law enforcement in questioning defendant Doody was permissible, i.e., lawful, and that defendant Doody was neither made any improper promises of benefit nor threatened or coerced to confess.

This Court, having considered this issue thoroughly as it relates to defendant Doody, finds that the statements made by defendant Doody were made voluntarily. In determining that the statements were voluntarily made, the Court has considered the time, duration, and location of the questioning, the fact that Miranda warnings were given, and, again, the defendant's youth, and inexperience with the criminal justice system.

IT IS ORDERED denying defendant Doody's Motion to Suppress Statements.

As mentioned above, the issue regarding defendant Garcia is different. Unlike defendant Doody's case where the facts of what happened are for the most part undisputed and apparent from the evidence tapes, the material facts relating to defendant Garcia's issue are more difficult to determine. Defendant Garcia contends that law enforcement initiated questioning of him after he had invoked his right to counsel. The State argues that it was

items from the home of defendant Garcia pursuant to a search warrant which were thought to have come from the temple. After asking for a lawyer, defendant Garcia was told to wait, was not free to leave, and was, therefore, in custody at that point. Up to that moment and even thereafter, defendant Garcia was offered food, drink, and the use of a bathroom. Law enforcement was deciding what would be the next step concerning defendant Garcia. At one point, defendant Garcia asked law enforcement why he was there at the offices. Defendant Garcia indicated a desire to contact his parents and was informed that his father, who had, in the meantime, contacted law enforcement about his son, was in route to the task force offices.

Approximately two hours after defendant Garcia had requested a lawyer, defendant Garcia was taken from the interview room where he had been and walked to another room within the task force offices where he was photographed and fingerprinted. Defendant Garcia was walked past Rolando Caratachea, an acquaintance of defendant Garcia who was also being questioned, in an attempt to elicit cooperation or a response from Caratachea. While being photographed and fingerprinted, Sgt. Kimball of the task force, who had not been involved with defendant Garcia to that point, noticed that defendant Garcia was alone with a female identification technician. Sgt. Kimball had been advised that defendant Garcia had requested a lawyer. Sgt. Kimball entered the room where defendant Garcia was because defendant Garcia was alone with the female identification technician and also to inquire of defendant Garcia if he was alright and if he needed

anything. With that, defendant Garcia inquired what was going to happen to him. Sgt. Kimball responded that he did not know and that certain decisions were being made. Defendant Garcia wanted to know what could happen, whereupon Sgt. Kimball said that defendant Garcia could go to jail or "walk out". In that regard, there were no promises made. Defendant Garcia then asked what would happen if he told the truth and St. Kimball indicated that the best decision was always to tell the truth but the decision to do that was defendant Garcia's. Sgt. Kimball informed defendant Garcia that they could not legally speak with him again and they would not, in fact, question him. Defendant Garcia did speak with his father privately and then indicated a desire to speak, once again, with law enforcement. Defendant Garcia was advised of his Miranda rights a second time, which he understood, and agreed to talk with law enforcement without a lawyer. Defendant Garcia, over a period of several more hours, confessed to his involvement in the crimes at the temple.

The law is clear that once the right to counsel has been asserted by an accused, further interrogation of the accused should not take place unless that accused initiates further communications, exchanges, or conversations with law enforcement.

As stated above, this Court now determines that when Sgt. Kimball approached the defendant, he did so out of concern for the welfare of the female identification technician, who was alone with defendant Garcia, and to inquire of defendant Garcia if he was alright. The Court finds that defendant Garcia

was not approached by Sgt. Kimball to speak about the investigation and that Sgt. Kimball, in first asking defendant Garcia if he was alright or how he was doing, did not initiate the investigative questioning again. There seems nothing wrong with law enforcement inquiring of defendant Garcia about matters relating to defendant Garcia's custody. The court concludes that, when defendant Garcia responded with "what's going to happen to me?", it was defendant Garcia who evidenced a desire to open up a more generalized discussion relating to the investigation. The evidence is clear that Sgt. Kimball was then careful to remind defendant Garcia that if defendant Garcia wished to talk again about the case that the decision was his to make and that law enforcement could not speak to him unless he, defendant Garcia, wished to speak. Moreover, there is nothing in the evidence to suggest that law enforcement used defendant Garcia's father in an manner to violate the rights of defendant Garcia. Finally, though, again, what happened concerning this issue is not on tape, once defendant Garcia and law enforcement were back on tape, what occurred off the tape was reconstructed in a manner with which defendant Garcia agreed. Therefore, this Court finds no violation of the Edwards rule in this case.

What then transpired is that defendant Garcia, after being advised of his Miranda rights for a second time, knowingly, voluntarily, and intelligently waived his right to counsel and his right to remain silent.

This Court having considered the evidence as it relates to defendant Garcia, finds that the statements

given by defendant Garcia were given voluntarily. As with defendant Doody, in finding that defendant Garcia's statements are voluntary, the Court has considered the fact that defendant Garcia was 16 years of age, the time, duration, and location of the questioning, the fact that Miranda warnings were given, and defendant Garcia's lack of experience with the criminal justice system.

IT IS ORDERED denying defendant Garcia's Motion to Suppress Statements.

APPENDIX E

JUVENILE MIRANDA WARNINGS

Date/Time: October 25, 1991 9:25 P.M. DR # 91-16695

Location: MAJOR CRIMES TASK FORCE

Officer: P. Riley Serial Number: 679

Subject: JONATHAN A. DOODY Age/DOB: 17 5-9-74

Address: 13235 W. TUCKEY LN. GLENDALE, AZ 85307

Subject's Signature: _____

Juvenile's present grade in school? 11 If juvenile is not in school, last grade completed? N/A
(self-reported)

Juvenile's reported performance in school?
B AVERAGE

These are your Miranda Warnings:
(Subject shall place his initials in the blank following the "Yes" or "No" response, as appropriate.)

1. **You have the right to remain silent.** (This means that you do not have to talk to me or answer any questions about this offense. You can be quiet if you wish.) Do you understand this? Yes JAD No___

2. **Anything you say can and will be used against you in a court of law.** (This means that anything you tell me, I can use later against you in court. A court of law is a place where a judge will decide whether you did [explain what the juvenile is suspected of]. A judge is like an umpire in a baseball game. He decides whether you have acted in a right or wrong way. If you did something wrong, you may be punished.) Do you understand this right? Yes JAD No ____

3. **You have the right to have an attorney present prior to and during questioning.** (This means, if you want one, you are allowed to have a lawyer here before and during my questions to you. An attorney is a lawyer who will speak for you and help you concerning the crime which we think you have done.) Do you understand this right? Yes JAD No ____

4. **If you cannot afford an attorney, you have the right to have one appointed for you prior to questioning.** (This means if you do not have the money to get a lawyer, if you wish, one will be given to you free of charge before you are questioned.) Do you understand this right? Yes JAD No ____

5. Do you want to have your parent(s) or guardian(s) present during questioning? Yes ____ No JAD

6. **The possibility exists that your case may be handled by adult court.** (This means that a

juvenile judge may decide that you do not belong in juvenile court because you are too old, have committed a serious crime, or have committed too many crimes before this one. If you are taken to adult court, you may get more punishment than you would receive in juvenile court.) Do you understand that?
Yes JAD No ____

If you want to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Do you understand each of these rights?
Yes JAD No ___

APPENDIX F

DR #91-16695
TAPE 31 (16284), SUBJECT: JONATHAN DOODY
INTERVIEWER(S): P. RILEY, D. MUNLEY
DATE OF INTEVIEW: OCTOBER 25, 1991, 2125 – 2212 HOURS
TRANSCRIBED: OCTOBER 30, 1991, A-246

RILEY: How ya doin' there, JONATHAN? Hey you know what, ah, RICK is, RICK is tied up right now doing a few things, ah, like I told you, I'm, I introduced you as, as, my name is PAT. This is ah DAVE MUNLEY, he's with the Sheriff's Office too.

DOODY: Hi.

MUNLEY: How you doing.

RILEY: Ah, if you don't mind I'd like to be able to just ah, I, I had a conversation with RICK about some of the things that he had discussed with ah you and some of the other guys before, so I'm familiar with most of the things that ah that he was asking questions about and things like that, so, what I'd like to do is just probably go ahead and do that with you ah, until RICK can break away and ah maybe come on in and join us a little bit later on.

DOODY: Okay.

RILEY: But ah to save time, uh and to get you back to doing with you need to do, might as well as just go ahead and start on things to save you some time and get things squared away. Ah, what I'd like to do first though, Jonathan, since we're in kind of a formal setting and things like that and because DAVE's a police officer and I'm a police officer and things like that ah sometimes some of the questions that we get into are, are a little bit sensitive and ah things like that. Ah, and what I'd like to do is before we, we go into that is ah, read something to you ah, and so that you understand some of the protections and things that ah, that you have. It's not meant to scare you or anything like that, ah don't ah don't take it out of context, okay.

DOODY: Okay.

RILEY: It's only something for, for your benefit and for our benefit, okay.

DOODY: Okay.

RILEY: And ah it's just so that you understand, and that ah, if you have any questions, by all means ask me, okay. I'd be more than happy to explain it to you and ah, and answer any questions that you have about anything, okay. So if there's a question that pops up in your mind at at any time, feel free to ask me, okay.

DOODY: Okay.

RILEY: Cause I'll, I'll be more than happy to explain it to you, okay?

DOODY: Okay.

RILEY: Ah, I'm sure you've heard this thing and you've heard it said on t.v. and things like that and it's not quite like t.v. portrays it ah, it's a little more, little less ah technical and a little less heavy if you want to put it ah that way, ah again, all it is, is its something that's ah for your benefit, as well as for our's, okay. Just so that you understand everything. What, what it's called is a Miranda Warning, okay. Have you heard that before?

DOODY: No.

RILEY: They call it Rights on t.v., okay. What, what that is and basically all that is Jonathan is, it's not necessarily something that is, like on t.v. where they portray it when somebody's ah guilty of doing something, ah, we read these things to people on somewhat of a regular basis, whether they're responsible for doing something or not, okay. So I don't want you to feel that because I'm reading this to you that we necessarily that you're responsible for anything, it's for your benefit, it's for your protection and for our's as well, okay?

DOODY: Okay.

RILEY: So as, as long as you understand that. I need to read this thing though, to you okay, and just make sure you understand everything and again like I said if you have any questions, by all means ask me, okay.

DOODY: Yeah.

RILEY: Ah, let me first write a few things down here real quick, like the date and time, it being October 25th, it is October isn't it.

MUNLEY: Uh-huh.

RILEY: I've kind of lost track of time in the last few days. What do you got, nine, nine twenty-five?

MUNLEY: Yeah.

RILEY: Yeah, I was telling Jonathan on my way over here, my battery in my car phone went...

MUNLEY: Dead on you again.

RILEY: Went capoots.

MUNLEY: PAT probably already explained it to you, but while we're sitting here talking, if you need anything, feel free to go ahead and ask...

DOODY: Okay.

MUNLEY: ...if you need something to drink, use the bathroom, you know if you need something to eat, we'll provide it for you, okay.

DOODY: Thank you.

RILEY: Any time you feel like you got to go let us know, just tell me hey, I got to go to the bathroom or I want a drink, we'll be more than happy to get it for you.

MUNLEY: You're in the R....R.O.T.C.?

DOODY: Uh-huh.

MUNLEY: At ah...

DOODY: Agua Fria.

MUNLEY: Agua Fria. How long have you been in there?

DOODY: Humm, three years.

MUNLEY: Is that your uniform?

DOODY: Yeah.

MUNLEY: You guys have a special event tonight?

DOODY: Ah yeah, we had a football game and ah I had to present the colors.

MUNLE: Oh yeah, you're on the rifle team too?

DOODY: Um, actually the Honor Guard. It's, let me see, Color Guard is basic like you have a Color Guard and people that carry the flag, you have the Honor Guard, people that do the rifle, and then you have your Drill Team, a lot of people that to do the rifle.

MUNLEY: Uh-huh.

RILEY: So do you do both that stuff?

DOODY: Yeah.

RILEY: Pretty good at it?

DOODY: Kind of.

MUNLEY: Lot of fun?

DOODY: Yeah.

MUNLEY: That's good.

DOODY: Except when you drop the rifle.

MUNLEY: That's good training for you.

DOODY: Yeah.

RILEY: Hey JONATHAN ah, how old are you now?

DOODY: Seventeen.

RILEY: Seventeen? What's your birth date?

DOODY: Ah, ninth, May.

RILEY: Uh, ninth of May?

DOODY: Uh-huh.

RILEY: Okay and the year is what?

DOODY: '74.

RILEY: '74? Okay. Yeah what, what would be your address that you're at right now or where you're staying?

DOODY: Ah 13, I'm not sure, I haven't memorized it yet.

RILEY: Just one of these fill in the blanks things here. Is that 13235 West Tuckey?

DOODY: Yeah, Glendale.

RILEY: Okay.

(short pause/no conversation)

MUNLEY: Did you just move in over there?

DOODY: Uh-huh, about a month, never had the chance to memorize the uh, well memorize the street, just not the number.

RILEY: Is, is this ah, who's residence would this be that you're at?

DOODY: Ah, GARCIA, I forgot his first name.

RILEY: Is that a friend of your's?

DOODY: Yeah.

RILEY: Okay; so it's the ah, GARCIA's residence?

DOODY: Uh-huh.

RILEY: Okay. Okay and you're in what's, what grade in school right now?

DOODY: Eleven.

RILEY: Eleventh? Okay. And ah, what kind of grades are you getting right now in school, as far as ah in average?

DOODY: Ooh, I don't really don't know, cause the report card never came out yet.

RILEY: Okay ah, how about the last report card that you got what what kind of average did you get?

DOODY: About a B A.

RILEY: B average? Okay. They using letters or numbers now days or..

DOODY: Actually both.

RILEY: Both. The reason I ask that is just to get an idea of how well ah, you understand things

and everything. Okay, and I'm just going to read these verbatim off the, the sheet here and then ah, as I said, if, if you have any questions by all means ask me, okay.

DOODY: Okay.

RILEY: And again, it's not meant to scare you so don't don't take it out of context JONATHAN okay. Ah what this is, is that ah you have the Right to Remain Silent and ah, what it states is that this means that you do not have to talk to me or answer any questions about ah, the matter that we're going to discuss with you, okay. You can be quiet if you, if you wish. Okay, did you understand that?

DOODY: Uh-huh.

RILEY: Okay, ah, as we go here, they ah, they ask that you initial ah, here indicating that I read it to you and that you understand it. Ah, so if you could ah, as we go, I will go ahead and just have you initial in the box.

DOODY: Okay.

RILEY: Okay. And the next one is that Anything that you say can and will be used against you in a court of law and what this means is that anything that you tell me, I can use later against you in court and a court of law is a place where a judge will decide whether ah, you did something or whether you didn't do something, okay. And a judge is like an

umpire in a baseball game. He decides whether you have acted in a right or wrong way, okay. Ah, if you did something wrong ah you may be punished and if you didn't you won't be punished, okay. Do you understand all of that?

DOODY: Uh-huh.

RILEY: Okay, if you could just initial there. Okay, and the next one states that you have the right to have an attorney present prior to and during questioning, and what that means that if you want one, you're allowed to have a lawyer here before and during you know my questions to you, okay. And then an attorney is a lawyer who will speak for you and help you concerning the crime or any kind of offense that ah we might think that you or somebody else is involved in, if you were involved in it, okay. Again, it not necessarily mean that you are involved, but if you were, then that's what that would apply to okay. And do you understand that?

DOODY: Yeah.

RILEY: Any questions?

DOODY: No.

RILEY: Okay. Okie doke.

DOODY: Oh yeah what's this for?

RILEY: Ah, okay I'll, again I'm gonna go in and, and explain some things to you. Ah, in the next one states that if you cannot afford an attorney, you'd have the right to have one appointed for you prior to questioning okay, and what this means, is if you do not have the money to get a lawyer ah, if you wished ah, one will be given to you free of charge before any questions and things like that, okay. Do you understand that?

DOODY: Uh-huh (indicating yes)

RILEY: Okay. Okay and there's one other thing under here and it says that ah, do would you want to have your parent or guardian present during our conversation with you now?

DOODY: Ah, it doesn't matter.

RILEY: It doesn't matter?

DOODY: Uh-huh.

RILEY: Okay. Ah, so you will be willing to talk with us right now?

DOODY: Yeah.

RILEY: Okay. And, if you just initial there where it says ah, since you say it doesn't matter, and, and that you'd be willing to talk to us ah...

DOODY: No?

RILEY: ....No, would be apparently the right response. Okay. And there's one other statement here is that ah, the possibility exist that ah, if this was, was your case or something that you might be involved in ah, the possibility is that it could be he handled by the adult courts, and ah what that means is that a juvenile judge could decide ah, that ah, you, if you were responsible for something do not belong in a juvenile court because you're either too old or that you ah, may have committed a serious crime or have committed too many crimes before this particular one or anything else. And if you're taken to adult court you may get more punishment than you'd receive in a juvenile court and that's all that basically says, okay. Do you understand that?

DOODY: Yeah.

RILEY: Okay.

DOODY: Ah...

RILEY: If you understand it then Yes would be the right one, yeah. Okay, okie doke. And at the bottom here is what it's saying is that if ah, you have no problem with ah talking to myself and David here right now, with ah, without anybody else present or attorney, or your parents, or, or anyone ah, then as I said we have some things we'd like to ask you and we'd like to do that. Ah, and if you have no problem with that, we'd like to talk to you

about that. Ah, but if you want to then ah, to stop at any time, that's something you can do as well, okay. Uh, do you have any questions at all about any, any of these things I've, I've explained to you?

DOODY: Ah, No.

RILEY: Okay. Do you understand all the things that I have read to you?

DOODY: Yes.

RILEY: Okay. And all that says here is that you do understand all those, and if you do, if you'll just initial the right box there. Okay. And again, is there any questions at all JONATHAN about, about any of that that I read to you?

DOODY: No, no.

RILEY: Okay. Alrighty.

MUNLEY: That might be real overwhelming to you, but just try to relax, it is something that you know, it's kind of a formal thing that we have to do, and ah, you, you look a little nervous, you look real tense...

DOODY: Yeah.

MUNLEY: ...just try to relax and...

DOODY: Okay.

MUNLEY: ...it's gonna be ah....

RILEY: The ah, as, as DAVE said ah JONATHAN unfortunately in the job that we do, JONATHAN, we, we talk to people every day, and we ask them questions that are personal and sometimes ah, may implicate them in things that ah, could be conceived as a wrong or a crime or an offense or whatever you want to call it. And because of that, we have to make sure that we, we protect everybody's interest and we explained things to, to them and that's what that process entails, okay. It's just to make you understand and let you know what those are, and again like I said, it's not meant to scare you or anything like that.

DOODY: Okay.

No. 09-1443

SUPREME COURT, U.S.
JUN 23 2010

IN THE

Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,
Petitioner,

vs.

JOHNATHAN ANDREW DOODY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

A. Whether the Court of Appeals correctly applied settled principles when it ruled that *Miranda* warnings given to a juvenile did not clearly inform him of his *Miranda* rights where the detective downplayed the significance of the warnings, and, in explaining the right to counsel's presence, told the juvenile that that right would apply if the juvenile was involved in a crime.

B. Whether the Court of Appeals correctly applied settled principles in ruling that the state court's determination that the warnings given to the juvenile advised him of his *Miranda* rights in a clear and understandable manner was an unreasonable application of federal law, as determined by this Court, and rested on an unreasonable determination of the facts in light of the state court record.

II.

A. Whether the Court of Appeals correctly applied settled principles when it ruled that a confession was involuntary where it was obtained through the custodial interrogation of a legally inexperienced juvenile from Thailand that began at night and lasted nearly 13 hours, and which was conducted by tag teams of Task Force officers, without significant breaks, while the juvenile sat in a straight backed chair, and received no food and just two soft drinks; where the tape recordings of the interrogation establish that the juvenile was subjected to relentless questioning, including over long periods of time when he

was silent and nonresponsive, and was told repeatedly that he had to answer his interrogators' questions, that the interrogation would continue until he did, and that his answers would not leave the room.

B. Whether the Court of Appeals correctly applied settled principles when it ruled that the state court's determination that the confession was voluntary was an unreasonable application of federal law, as determined by this Court, and rested on unreasonable determinations of the facts in light of the state court record.

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INTRODUCTION

Respondent Johnathan Doody respectfully opposes the request by the Petitioner [hereinafter "State" or "Arizona"] that certiorari be granted in this matter. The Petition itself shows the *absence* of any good, let alone compelling, reason for the granting of discretionary review; the Petition reflects only dissatisfaction with the Ninth Circuit's disposition of the matter. The State's argument that the Ninth Circuit "disregarded" the AEDPA rests on a distortion of the record and misstatement of the basis of the Ninth Circuit's ruling.

STATEMENT OF THE CASE

The Ninth Circuit Court of Appeals (en banc), after careful consideration, determined that Doody was entitled to habeas corpus relief under the AEDPA, on two separate Constitutional grounds, each one under both 28 U.S.C. § 2254(d)(1) and § 2254(d)(2). A panel of the Ninth Circuit, and then the Ninth Circuit en banc, ruled that under the facts of this particular interrogation, Doody's confession was involuntary. This sleep-deprived juvenile's will was overborne by his indefatigable interrogators during an interrogation that lasted over 12 hours without food or significant breaks; the contrary determination by the Arizona Court of Appeals was both an unreasonable application of federal law, as determined by this Court, and rested on multiple unreasonable determinations of fact.

The Ninth Circuit en banc also ruled that Johnathan Doody was not given proper *Miranda* warnings and that the State court's determination that the warnings were clear and understandable constituted

both an unreasonable determination of the facts and an unreasonable application of clearly established federal law. The Court reached these conclusions only after listening to audiotapes of the entire interrogation, which began at 9:25 pm on October 25, 1991 and ended at 10 am the next day. Those tapes included the purported advisement of *Miranda* rights.

In reaching these conclusions, the Ninth Circuit did not "disregard" the AEDPA, but carefully applied it. Its determination that the *Miranda* warnings given were improper and inadequate was entirely consistent with this Court's recent decision in *Florida v. Powell*, 130 S.Ct. 1195 (2010); with this Court's seminal *Miranda* ruling; and with *California v. Prysock*, 453 U.S. 355 (1981); and *Duckworth v. Eagan*, 492 U.S. 195 (1989), which re-affirm that the warnings given must reasonably convey the defendant's rights as required by *Miranda*.

Likewise, the Ninth Circuit did not disregard the AEDPA in ruling that Doody's statements were involuntary, and that the State court's contrary determination was unreasonable, both as a matter of law and fact. It did not "mischaracter[ize] the state court record, redetermin[e] witness credibility, [or] draw[] inferences adverse to the states [sic] courts' legal and factual determinations." Petition at i. As demonstrated below, the Petition's contrary claims misstate and mischaracterize the record on these scores.

Arizona's "Questions Presented" section is both misleading and argumentative, and violates Supreme Court Rule 14.(1)(a). Its first sentence asserts as fact that "Johnathan Doody killed eight Buddhist monks and a nun at a Buddhist temple near Phoenix[,] Arizona

in 1991", Petition at i, even though the jury found Doody guilty of felony murder, and rejected the State's claim that he was the actual shooter. Though Alex Garcia, the State's cooperating witness, testified that Doody hatched a plan to kill the monks and that Doody was the shooter, the jury disbelieved Garcia's testimony and did not find Doody guilty of the intentional murders that Garcia described.

In summation, the prosecutor argued that Doody's confession alone was sufficient to establish felony murder; other than Doody's confession, there was only slight and vigorously contested circumstantial evidence that he had any involvement at all.

But, this case was rife with false confessions. At the time of Doody's interrogation, the State had already indicted four men – "the Tucson Four" – for the Temple murders based on *their* confessions to the crimes. Though Doody's interrogators succeeded in getting Doody to agree that the Tucson men were involved, the State thereafter dropped the charges against those adults, taking the position that, notwithstanding their own confessions, they had no involvement at all. The State's case depends on the notion that some of what Doody told his interrogators was both voluntary and reliable, even though his statements inculpating the Tucson men were false and, plainly, coerced.

The State studiously ignores that one of the reasons coerced confessions are excluded is their *unreliability*. Juveniles, like Doody, are *particularly* vulnerable to coercion, and *particularly* likely to make statements that are not true. It ignores that just this Term, in *Graham v. Florida*, ___ S.Ct. ___, 2010 WL 1946731 (2010), this Court re-affirmed what it had

recognized in *Roper v. Simmons*, 543 U.S. 551 (2005): minors are "more vulnerable" than adults to "outside pressures." *Graham v. Florida*, 2010 WL 1946731, *13. "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Id.*

Thus the premise from which the State begins its Petition to this Court – that Johnathan Doody killed nine Buddhists at a Buddhist Temple – is flawed. So, too, is the remainder of the State's argument for certiorari.

REASONS FOR DENYING THE WRIT

In this unusual and extreme case, the federal Court of Appeals properly concluded that the State court's ruling that the juvenile confession was voluntary rested on an unreasonable determination of the facts and constituted an unreasonable application of the law. Review by this Court is not necessary to address the well-settled law governing the voluntariness of juvenile confessions, nor the AEDPA standards that apply when a defendant seeks habeas relief from a state court conviction based on a coerced juvenile confession.

Though the State tries to lump this case with other cases in which this Court reversed Ninth Circuit grants of habeas, in this case, the Ninth Circuit did not misunderstand or ignore its responsibilities under AEDPA. It did not re-weigh evidence or improperly make its own factual determinations where it was obligated to defer to the State's.

On the contrary, fully recognizing the deference that must be paid to state court determinations and the

narrow circumstances in which habeas relief is appropriate under the AEDPA, the Court of Appeals determined that, in this unusual case, in two separate ways, the State had violated Doody's clearly established Constitutional rights, and that the State court's contrary legal and factual determinations were not only wrong, but unreasonable. Federal judges *follow* the AEDPA mandate, *uphold* the Constitution they are sworn to uphold, and *serve* the interests of federalism when they grant relief in those cases where the AEDPA standards are met.

Implicit in Arizona's argument is the view that any determination by a federal court that a legal or factual conclusion by a State court is unreasonable in fact constitutes a forbidden re-weighing of the facts, a proscribed re-evaluation of the State court record, an inappropriate encroachment on the State's prerogatives, and an insult to the dignity of State courts. That view of the AEDPA is incorrect.

As we demonstrate below, the majority's analytical approach and its conclusion were fully respectful of the State court, and appropriately implemented this Court's Constitutional and AEDPA jurisprudence. A grant of certiorari in this unusual case would be a misuse of this Court's valuable and limited resources and would not address any new or unresolved issues.

I. The Federal Court Properly Applied Well-Settled AEDPA Standards in Granting Relief Because Proper *Miranda* Warnings Were Not Given

The *Miranda* warnings Doody was given were not the crisp, straightforward warnings this Court recently quoted in *Berghuis v. Thompkins*, __ S.Ct. __, 2010 WL 2160784, *4 (2010). It took Detective Riley 14 pages of transcript just to give them. *See* A-4-7; A-35-36.

Although Doody was a Thai-born, legally inexperienced juvenile who said he had never even heard of *Miranda* warnings, Detective Riley's words downplayed their seriousness and obscured their importance. Four times, Detective Riley misrepresented the purpose of the warnings, telling Doody that this was something "to save time," "to save you some time," "to get you back to doing what you need to do," and to "get things squared away." Twice Detective Riley told Doody not to "take it out of context," which, in this context, could only have meant that Doody should not take the warnings too seriously. According to Detective Riley, "it's a little more, little less ah technical and a little less heavy..."; it was just "kind of a formal thing that we have to do."

With respect to the right to counsel, purporting to explain the printed warning on the State's juvenile *Miranda* form, Detective Riley told Doody:

> [A]n attorney is a lawyer who will speak for you and help you concerning the crime or any kind of offense that ah we think that you or somebody else is involved in, *if you were involved in it, okay*. Again, it [sic] not

necessarily mean that you are involved, *but if you were, then that's what that would apply to okay.*

Arizona did not even defend these warnings on the merits in the State court. And, in the en banc argument before the Ninth Circuit, Arizona's attorney acknowledged that what Doody was told was not clear.

Seeking certiorari review, Arizona now argues that the Ninth Circuit majority and concurrence "myopically focused upon the above-quoted statement, instead of the context in which it was made." Petition at 27. But, to evaluate whether warnings are correct and "reasonably convey[ed] to [the suspect] his rights as required by *Miranda*," *Powell*, 130 S.Ct. at 1204, quoting *Eagan*, 492 U.S. at 203, it is essential to consider what the officer actually said. And, here, as Judge Kozinski put it in concurring, because there exists a tape recording, one can actually hear "the officer's *Miranda* warnings fly off the rails." (A-83)

This occurred with respect to the *critical* right to counsel warning, though "the right to have counsel present at the interrogation is indispensable to the Fifth Amendment privilege under the system we delineate today." *Miranda v. Arizona*, 384 U.S. 436, 469 (1966). A clear and accurate warning about the right to have counsel present is *particularly* important where minors are concerned, because juveniles "have limited understandings of the criminal justice system and the roles of the institutional actors within it." *Graham v. Florida*, *supra*, 2010 WL 1946731, *20. Thus, it is *Arizona*, not the federal court, that ignores the *context* of these warnings.

In attacking the Ninth Circuit's decision, the Petition relies heavily on the dissent written by Judge Tallman, but Judge Kozinski's concurrence demonstrates why Judge Tallman was wrong.

> The dissent tells us that the state court's characterization of the officer's words was not unreasonable because the officer might have meant to "reinforce that Doody was 'faced with a phase of the adversary system.'" Dissent at 3039-40 (quoting *Miranda*, 384 U.S. at 469). I'm not entirely sure what this means, and I certainly don't see anything so benign lurking in the officer's words. ... The officer did say something about the adversary system: That a lawyer will help you "if you were involved" in criminal activity, and that the right to an attorney only applies to you if "you were involved." This of course is not true: The innocent no less than the guilty, are entitled to a lawyer. (A-84-85)

Yet, under the "explanation" Detective Riley gave to Doody, invoking the right would itself be an acknowledgment that Doody was involved in criminal activity.

Judge Kozinski's opinion also made clear why the dissent's view of AEDPA's application *to this case* was wrong.

> The dissent offers a number of other arguments for denying relief, even if the warnings weren't "clear," "understandable" or "appropriate. *See* Dissent at 3039-41.

> Our dissenting colleagues appear to believe that AEDPA deference requires us to indulge every possible justification for the state court opinion, whether or not the argument is consistent with what the state court actually held. But we know that's not the case. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005) .... What deference requires is paying attention to what the state courts actually have to say. We defer when state courts reasonably adjudicate claims of federal rights, even if we think they're wrong. But if the state courts don't act reasonably, deference comes to an end. We certainly aren't required to defer to justifications that the state courts themselves did not consider.
>
> Perhaps, as the dissent suggests, the officer's words could be "construed as having no effect on Doody's understanding of his right to counsel." Dissent at 3039. Maybe Doody wasn't listening to what the officer said, or maybe he didn't believe it. Of course, that's not what the state court said. Even if it were, it's entirely irrelevant. *Miranda* establishes an objective test. We can't uphold defective warnings because they might have been inadvertently successful, just as we can't disregard a properly administered warning because a particular suspect might have misunderstood. (A-88)

The Ninth Circuit decision is fully consistent with *Florida v. Powell*, 130 S.Ct. 1195 (2010). The

warnings given to the adult, Powell, satisfied the Constitutional standard, but the warning in this case – which told Doody that the right to an attorney applied *if he had committed the crime* – was different. As Judge Kozinski noted, even his dissenting colleagues admitted that the officer's words "could be construed" to say you only get a lawyer if you're guilty, which is flat out wrong. A-85. Thus, on this basis alone, the warnings given to Doody did not "reasonably convey" Doody's rights as required by *Miranda*.

The Ninth Circuit ruled, alternatively, that the warnings were defective because they obscured and minimized the warnings' significance. In arguing that the Ninth Circuit erred, the Petition misstates what the en banc majority held. The Ninth Circuit did not determine that the State court's determination was unreasonable because Riley downplayed the warnings' significance "*by telling Doody that the police did not necessarily suspect him of having committed a crime.*" Petition at 23 (emphasis added). The Court of Appeals concluded that the officers improperly downplayed the warnings' importance because, as the tape-recording and transcript establish, "During the administration of the warnings, Detective Riley emphasized that Doody should not "take them out of context," and implied to a juvenile, who had never heard of *Miranda*, that the warnings were just formalities." (A-36)

As Doody has argued in connection with his claim that his confession was involuntary, this was not the only time when Doody's interrogators conveyed a message at odds with *Miranda* and the Constitutional rights it safeguards. In the course of the interrogation, contradicting the warning that what Doody said could and would be used against him, the officers falsely told

him that what he said would stay in that room. ("What you tell us right now is gonna stay right here." "Johnathan, we're not even gonna go out and be telling everyone what you're saying that's not the way we do business." "We're in a room, you're not in court, you need to come clean with us on this." "We're gonna protect this, this stuff.")

Contradicting the warning that Doody had an absolute right to remain silent which he could exercise at any time, his interrogators repeatedly said and implied that he had to talk to them. ("You just have to open up," "had to open up," "have to clear yourself," "have to help us," "have to tell us," "have to get rid of it," "have to do it.") The thrust of the entire interrogation was that Doody had to tell the officers what they wanted to know, and that the questioning would continue until he did. ("I'm gonna stay here until I get an answer;" "We're gonna sit here and have to go through this thing ... your (sic) not telling the truth ...")

These statements to Doody by his interrogators were made hours into the interrogation, long after the original *Miranda* warnings were given. Because people – and teenagers in particular – are likely to be affected most by that which they most recently heard, whether or not the officers' subsequent statements are relevant to whether Doody was properly Mirandized, they are relevant to the voluntariness or involuntariness of Doody's confession, the subject to which we turn now.

II. The Federal Court Properly Applied Well-Settled AEDPA Standards in Granting Relief Because Respondent's Confession Was Involuntary

The Ninth Circuit's disposition of Doody's involuntariness claim was likewise correct, and raises no certworthy issue. The en banc majority, and the panel which had unanimously reached the same conclusion, carefully considered the AEDPA standards before concluding that Arizona's voluntariness determination was not just wrong under the applicable Constitutional standard, but unreasonable.

Arizona asserts that the en banc majority "seized upon three alleged 'unreasonable determination' (sic) of the 'facts' mentioned by the Arizona Court of Appeals in its voluntariness analysis." Petition at 32. By placing the word "facts" in quotation marks, it suggests that these are not factual determinations at all. It further asserts that these "facts" – Arizona's quotation marks – are "not of significant consequence to the Arizona Court of Appeals' overall determination of voluntariness." Petition at 33. Arizona's argument is specious.

Though Arizona has called this "nit-picking" and argues that the Ninth Circuit ignored the AEDPA, the Ninth Circuit's analysis – and its focus upon the particular State court findings upon which the State court based its decision – is precisely what Section 2254(d)(2) requires. The facts that the Ninth Circuit determined were unreasonably found were not random or insignificant; they were the foundation of the State court's ruling that the confession was not involuntary.

The Arizona Court of Appeals acknowledged the "troublesome length" of Doody's 12-hour plus overnight interrogation, but stated: "Each of the officers involved ... testified at the suppression hearing that Doody remained alert and responsive throughout the interrogation and did not appear overtired or distraught. Our review of the audio tapes confirms the officers' testimony." (C-10) In the State court's view, this somehow neutralized the "troublesome" fact that Doody's interrogation lasted so long.

However, and as the Ninth Circuit majority concluded, *the state record shows that not a single one of Doody's interrogators testified that Doody remained alert throughout the interrogation.* The State has never pointed to a shred of testimony that shows otherwise.

Moreover, not a single officer testified that Doody remained *responsive* throughout the interview, and the tapes themselves show conclusively that he did not. They show that Doody was completely *unresponsive* for many, long periods of time. (A-51-53) Accordingly, as the Ninth Circuit majority concluded, it was also unreasonable for the Arizona Court of Appeals to conclude that there "is no evidence that calls into question the testimony that Doody remained alert and responsive." (A-31) Not only was there no such testimony to begin with, but the tapes themselves are evidence that shows – as might be expected – that Doody was *neither* alert nor responsive throughout the long night of interrogation.

The Arizona Court, in discounting the "troublesome" length of the interrogation, also relied on

the "fact"[1] that, although the interview lasted nearly thirteen hours, after about two and a half hours of questioning, "Doody admitted he had borrowed Caratachea's rifle [the murder weapon] at the time of the temple murders." But this, too, as the Ninth Circuit majority shows, was an unreasonable factual finding for it was a misstatement of the record. Two and a half hours into the interrogation, Doody acknowledged that he had borrowed the rifle a month *before* the Temple crimes, not at the time of those events. (See A-57) Doody's first admission to any involvement occurred after more than *six* hours of intense questioning.

Similarly, the Arizona Court of Appeals' conclusion that the lengthy interview was not coercive rests on the supposed "courteous, almost pleading style of questioning [employed] during most of the interview." In fact, though, the tapes memorialize hours of questioning that is insistent and commanding, and not "pleading" or "courteous" at all.

> [T]he audiotapes demonstrate that the detectives' relentless and uninterrupted interrogation of an unresponsive juvenile was far from "courteous". Instead the detectives continuously demanded, over and over without a response from Doody, answers to their questions. ... Although the detectives sometimes couched their questions in "pleading" language, their tones were far from pleasant, varying from pleading to scolding to sarcastic to demeaning to demanding. Regardless of

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[1] *We* use quotation marks here because the supposed "fact" is contrary to the record.

> tone, over twelve hours of insistent questioning of a juvenile by tag teams of two, three and four detectives became menacing and coercive rather than "courteous"... Any doubt regarding this matter is easily resolved by listening to the audiotapes. At times, the tones of the detectives are downright chilling. (A-54)

At one point, the officers were yelling so loudly that their voices were picked up on the tape recording of the interrogation of *Garcia*, which was being conducted in another room.

The State court's conclusion that Doody's confession was voluntary was an incorrect and unreasonable application of this Court's jurisprudence on the subject. *See Dickerson v. United States*, 530 U.S. 428, 434 (2000)(in determining voluntariness, court "examines whether a defendant's will was overborne by the circumstances surrounding the giving of a confession...The due process test takes into consideration 'the totality of the surrounding circumstances – both the characteristics of the accused and the details of the interrogation'"); *Reck v. Pate*, 367 U.S. 433, 440 (1961)("all the circumstances attendant upon the confession must be taken into account"); *Gallegos v. Colorado*, 370 U.S. 49, 52 (1962)("application of these principles involves close scrutiny of the facts of individual cases"); *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993)("length of the interrogation ... its location ... its continuity"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973)("[I]f his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."); *In re Gault*, 387 U.S. 1, 45 (1967)("admissions and

confessions of juveniles require special caution"); *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948)("Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest.").

As the Ninth Circuit majority wrote:

> The audiotapes of Doody's interrogation are dispositive in this case, as we are not consigned to an evaluation of a cold record, or limited to reliance on the detectives' testimony. We can readily discern from the audiotapes an extraordinarily lengthy interrogation of a sleep-deprived and unresponsive juvenile under relentless questioning for nearly thirteen hours by a tag team of detectives, without the presence of an attorney, and without the protections of proper Miranda warnings. The intensive and lengthy questioning was compounded by Doody's lack of prior involvement in the criminal justice system, his lack of familiarity with the concept of *Miranda* warnings, and the staging of his questioning in a straight-back chair, without even a table to lean on. None of these considerations were even mentioned by the Arizona Court of Appeals. (A-44-45)

CONCLUSION

In this unusual and extreme case, the grant of federal habeas corpus relief was not only permitted by the AEDPA but compelled by it. The case raises no new or unresolved issues. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

JOHNATHAN ANDREW DOODY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner stands by the factual and procedural background set forth at pages four through fourteen of the petition for writ of certiorari. The evidence presented at trial, apart from Doody's largely self-exculpatory statements to law enforcement officers, establishes that Doody robbed and murdered eight Buddhist monks and a nun.

REASONS FOR GRANTING THE WRIT

Doody asserts that, in "this unusual and extreme case," the *en banc* majority followed the AEDPA and this Court's caselaw construing the AEDPA and correctly determined that the Arizona Court of Appeals' factual and legal findings that Doody's statements to law enforcement officers were *Miranda*-compliant and voluntary were "unreasonable." Not so.

I. *The Arizona Court of Appeals' Determination that Doody was Adequately Advised of and Waived his Miranda rights was not Objectively Unreasonable.*

In his opposition, Doody asserts, "Arizona did not even defend these [*Miranda*] warnings on the merits in State court. And, in the en banc argument before the Ninth Circuit, Arizona's attorney acknowledged that what Doody was told was not clear." (Brief in Opposition at 7.) This mischaracterizes the record both in state and federal court.

In state court, the State of Arizona asserted that Doody was not "in custody" when he voluntarily accompanied detectives to the Task Force headquarters

and was questioned and, therefore, *Miranda* was simply inapplicable. *See, e.g., Stansbury v. California*, 511 U.S. 318, 322 (1994) (*Miranda* warnings required only if person being questioned is "i*n custody*"); *Oregon v. Mathiason*, 429 U.S. 492, 494–95 (1977) (same). Indeed, the trial court found that Doody was not "in custody" for purposes of *Miranda*:

> As to [Doody], this Court finds that *he was not under arrest or in custody when he was transported to the task force offices for questioning* on October 25, 1991. Even though not in custody, law enforcement did advise defendant Doody of his Miranda rights in language that could, and, in fact, was, clearly understood by defendant Doody. This Court further finds that defendant Doody did knowingly, voluntarily, and intelligently give up his right to remain silent and to have an attorney or a parent present while being questioned and did agree to talk.

(Pet. App. D at 4, emphasis added.)

On appeal, the State initially argued that Doody waived the trial court's finding that he was not "in custody," because he did not challenge the trial court's ruling to that effect. (See Pet. App. C at 17.) The State alternatively argued that Doody was adequately advised of and waived his *Miranda* rights. (See *id.*) The Arizona Court of Appeals gave Doody the benefit of the doubt in finding that *Miranda* applied:

> The state's waiver argument relies on an overbroad reading of the trial court's findings.

> The trial court's factual findings resolved only the limited issue that Doody "was not under arrest or in custody *when he was transported to the task force offices for questioning* on October 25, 1991." Contrary to the state's assertion, the trial court did not address whether Doody was in custody during the interrogation. Doody's failure to challenge the trial court's narrow finding that he was not in custody prior to the interview does not constitute a waiver of his argument that the officers failed to advise him sufficiently of his rights before obtaining his inculpatory statements. For purposes of review, we accept Doody's characterization of the questioning as a custodial interrogation requiring *Miranda* warnings.

(*Id.*, emphasis in original.) The court of appeals then went on to find that Doody was adequately advised of and waived his *Miranda* rights. (*Id.* at 17–18.)

Thus, while the State asserted, both in the trial court and on appeal, that *Miranda* was inapplicable, it has *always* maintained that Doody was adequately advised of and waived his rights.

Furthermore, in briefing in federal court, and at oral argument before the *en banc* panel, Petitioner has steadfastly maintained that Doody was clearly advised of and waived his *Miranda* rights. Detective Riley read Doody his right to counsel verbatim off a printed Juvenile *Miranda* Warnings Form (Pet. App. E). (Pet. App. F at 10.) It was only in explaining a parenthetical on the form that Detective Riley varied, attempting to convey to Doody that he had the right to

the presence of counsel even though the officers did not necessarily believe that he was involved in the crimes. (*Id.*) Viewed in isolation, Detective Riley's expounding upon the parenthetical explanation, if taken literally, could have been confusing. However, as this Court has recently reiterated, a reviewing court must not myopically focus upon a word or two to the exclusion of the entire colloquy (as well as the written waiver form signed by Doody). *Florida v. Powell*, 130 S. Ct. 1195, 1204 (2010) ("The inquiry is simply whether the warnings reasonably conve[y] to [a person] his rights as required by *Miranda*.") (quoting *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)). Viewed in context, it is clear that Doody was adequately advised of and waived his *Miranda* rights, and that the Arizona Court of Appeals' determination to that effect is not "unreasonable."

Doody also claims that statements by detectives "made hours into the interrogation" regarding not telling others what Doody told the detectives and imploring Doody to cooperate "conveyed a message at odds with *Miranda* and the Constitutional rights it safeguards." (Opposition at 10–11.) First, statements "made hours into the interrogation" are simply irrelevant to whether Doody was advised of and waived his *Miranda* rights hours earlier. Doody does *not* assert that he, at any point, invoked his *Miranda* rights, and the record refutes any such assertion. Moreover, as this Court recently made clear, "an accused who wants to invoke his or her right to remain silent [must] do so unambiguously." *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010).

Second, the statements quoted by Doody were made in the context of attempting to assuage Doody's feigned fear that fabricated individuals responsible for the murders would kill Doody, his family, and Doody's girlfriend, if Doody informed on them. Thus, the statements were made in an attempt by the detectives to assure Doody that he and his loved ones could be protected if Doody cooperated.

II. *The Arizona Court of Appeals' Determination that Doody's Statements were Voluntary was not Objectively Unreasonable.*

Doody attempts to support the *en banc* majority's conclusion that the Arizona Court of Appeals made an "unreasonable determination" of fact in noting that "Each of the officers involved...testified at the suppression hearing that Doody remained alert and responsive throughout the interrogation and did not appear overtired or distraught. Our review of the audio tapes confirms the officers' testimony." (Opposition at 13) (quoting Pet. App. C at 10.) Doody writes that the *en banc* majority concluded that "*the State record shows that not a single one of Doody's interrogators testified that Doody remained alert throughout the interrogation.* The State has never pointed to a shred of testimony that shows otherwise." (*Id.*, emphasis in original). To the contrary, Petitioner pointed out in its brief in the Ninth Circuit that Detective Riley testified that Doody was "very attentive" and never "display[ed] any real overt sign of being fatigued or tired," and never asked to sleep. (Ans. Br. at 16–17.) Petitioner also pointed out that Detective Sinsabaugh testified that, when he entered

the room at about 2:45 a.m. and became the primary questioner, Doody was "very erect, had a military bearing, and he appeared alert." (*Id.* at 17–18.) Thus, Petitioner has identified testimony supporting the court of appeals' finding.

Moreover, as pointed out by the dissent, Doody's decision not to answer certain questions does not negate the court of appeals' finding that he was "alert and responsive." (Pet. App. A at 125–26.) Rather, it is more reasonably interpreted as selective avoidance of questions for which he did not have a ready answer as he attempted to conjure up a story distancing himself as much as possible from the murders.

Doody stresses the *en banc* majority's conclusion that the Arizona Court of Appeals' erred in finding that Doody admitted borrowing the rifle "at the time of the temple murders." (Opposition at 14.) However, Doody fails to acknowledge the majority's blatant mischaracterization of that statement as an admission "to involvement in the temple murders after two and one-half hours of questioning." (Pet. App. A at 56.) Rather, as pointed out by Petitioner, the Arizona Court of Appeals drew a distinction between Doody's admission to merely borrowing the rifle and subsequently admitting participation in the crimes:

> Although the entire interrogation lasted approximately thirteen hours, Doody admitted he had borrowed Caratachea's rifle at the time of the temple murders after approximately two and one-half hours of questioning. *Doody admitted he had participated in the temple robbery after approximately six and one-half*

> *hours of questioning*, and his description of the events at the temple spanned nearly two hours.

(Pet. App. C at 9–10, emphasis added.)

Furthermore, as pointed out by the dissent, although Doody told the detectives that he borrowed the rifle "close to the end of June" and the murders were committed "in [early] August," the court of appeals', writing its decision five years later, "reasonably describes the time frame." (Pet. App. A. at 129.) The fact that the *en banc* majority seized upon this relatively insignificant statement evidences the lengths to which it went to find fault with the Arizona Court of Appeals' factual and legal findings. As aptly stated by the dissent:

> Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the question before us is simply whether the Arizona state courts reasonably applied federal law and determined the facts in concluding that Doody's confession to participating in the murders was voluntary. Arizona conducted a ten-day evidentiary hearing and a thirty-four day trial. Five judges and twelve jurors have thoroughly reviewed all of the circumstances surrounding the interrogation. All concluded Doody voluntarily confessed. My colleagues nonetheless parse the record, re-weigh the evidence, and reach a *de novo* determination that the written and oral *Miranda* warnings were inadequate and the confession was coerced. In doing so, the majority discards as objectively unreasonable the factual findings made by the trial court, the

jury's considered verdict, and the well-reasoned opinion of the Arizona Court of Appeals.

(Pet. App. A. at 91–92.)

CONCLUSION

Petitioner requests that this Court grant certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted

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